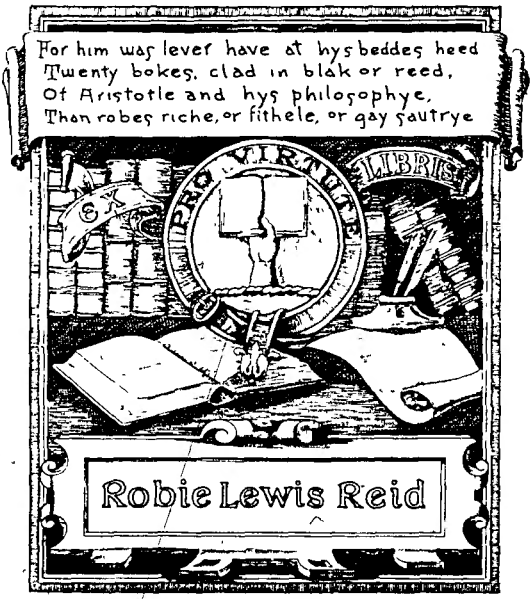
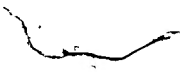
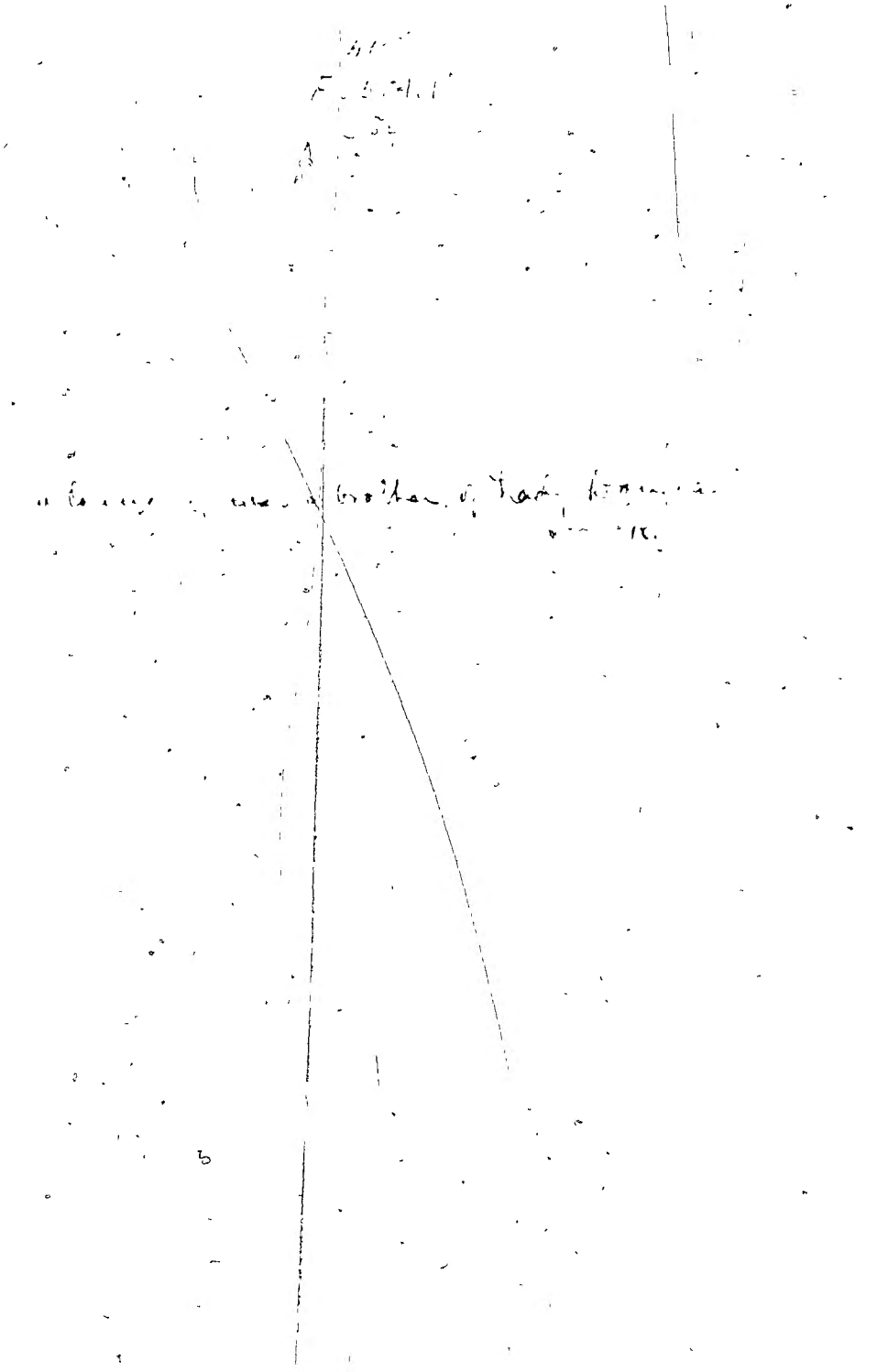






SUPERIOR COURT.

MONTREAL.

No. 902.

JOHN CONNOLLY, *Plaintiff*;

vs.

JULIA WOOLRICH, *Defendant*;

AND

THOMAS R. JOHNSON, *et al.*,
Executors and Defendants par Reprise d'Instance.

PRESENT—THE HONBLE. MR. JUSTICE MONK.

The facts of this most important case appear from the remarks of the Court (Mr. Justice Monk) in giving judgment for Plaintiff, at Montreal, the 9th July, 1867, as follows:—

This is an action instituted the 13th of May, 1864, for the recovery by the Plaintiff of the sixth portion of one half of the estate in Defendant's possession, and claimed by Plaintiff as his share in a community of property alleged by him to have existed between his father, the late William Connolly, and *Susanne*, Connolly's wife, mother of the Plaintiff. The case is one of importance, and involves a great number and variety of questions, both of law and fact. The Court has considered it an imperative duty, as the decision is one of much interest to the parties, and in some measure, to the public, to enter at length into a review

of the peculiar circumstances of the case, and also of the law by which it must be determined.

The declaration sets forth in substance, that in the year 1803, the late Wm. Connolly, at the *Rivière aux Rats*—Rat River—in the Rebaska, or Athabaska country, in that part of British America, known and distinguished as the Hudson's Bay Territory, married an Indian woman, called *Susanne Pas-de-nom*, of the Cree tribe or nation; that this marriage was celebrated according to the usages and customs of the Territory, and could not be otherwise solemnized, as there were no priests or ministers residing there at that time; that these parties lived together continuously and happily as husband and wife from 1803 till 1832, during which period there were born of this marriage several children, of whom Plaintiff is one; that Wm. Connolly died at Montreal on the 3rd June, 1849, leaving a large amount of property in Upper and Lower Canada, which is, in part, enumerated and described. It is then averred, that there was no contract of marriage between the parties, and that consequently a community of property existed between them according to the law of Lower Canada, and that the real and personal estate was acquired during the existence of the marriage; that Mrs. Connolly died at Red River, in the Hudson Bay Territory, on the 14th August, 1862, leaving the Plaintiff, and several other children, her heirs-at-law; that Wm. Connolly, the father, left a will, dated in 1848, by which he bequeathed all his property to one Julia Woolrich and to two children, issue of a connection between Wm. Connolly and the said Julia Woolrich; and that the latter took possession of all the estate, and still holds it; that Connolly, the father, could dispose of only one half of the property, inasmuch as his lawful wife was living at the time of his death, and she was, consequently, entitled to the other half of the estate, as *commune en biens* with her husband; then, alleging baptism of children in December, 1831, the Plaintiff concludes that he be declared proprietor of the sixth part of his mother's half share of the estate belonging to the community, and that Defendant do account.

It is to be remarked, that Rebaska or Athabaska is stated (whether in 1803, or at the time of the bringing of the action, does not appear very certain) to be situated within the Hudson's Bay Territory; and it is also to be noted that the Plaintiff does not pray to be declared the legitimate offspring of Wm. Connolly and the Indian woman, Plaintiff's mother.

Defendant pleads that Connolly was never married to Susanne; that on the 16th May, 1832, he was married to the Defendant,

Julia Woolrich, according to the rites of the Church of Rome, from which date they enjoyed the *status* of husband and wife, and in this marriage there was continual acquiescence on the part of Susanne and her family, and among others by the Plaintiff; that by the laws of the Hudson Bay Territory, and particularly at the *Rivière aux Rats*, and by the law which has prevailed in that country for the last 100 years, no community of property resulted from a marriage there.

The Plaintiff answers, that at the time of Connolly's pretended marriage to Julia Woolrich, 16th May, 1832, Susanne, Connolly's lawful wife, was living, she having died long after, that is on the 14th August, 1862; that Wm. Connolly was born at Lachine, in Lower Canada; that he had not resided in the H. B. Territory with the intention of remaining, but intended always to return; that he was in the employ of the Company; returned to Montreal in 1831, and remained in Lower Canada till his death in 1849.

The Plaintiff has ignored entirely the marriage between Wm. Connolly and Julia Woolrich, and the suit has been directed against her as an unmarried woman, as a *spinster*. Neither by his declaration, nor by his special answer, has the Plaintiff prayed that this alleged marriage be declared null. It is also to be observed, that the Defendant has not, by her plea, asked that the marriage existing between Connolly and the Indian, be declared a nullity, or that the Court should hold that such a marriage never legally existed. The only questions, therefore, raised by the pleadings and presented for my adjudication, are 1° was there a legal marriage between Connolly and the Cree woman; and if so 2° did a community of property result from that marriage, under the circumstances of this case?

Upon this restricted, but intelligible issue, the parties proceeded to the adduction of evidence which will receive the careful consideration of the Court hereafter. But before entering upon an examination of this testimony where it may prove concurrent and conclusive; where it may conflict, or bear a less clear and direct proof of important facts, it may be proper, with a view to a more easy understanding of the real difficulties of the case, to state generally but briefly, what the testimony of record establishes indisputably as matters of fact in the opinion of the Court.

The late Wm. Connolly went to the Indian country as a clerk in the service of the North-West, not the Hudson's Bay, Company, in the year 1802 or 1803. He was stationed at the *Rivière aux Rats*, or Rat River, in the Athabaska district, which is situated, according to Judge Johnson's evidence, about 2000 miles from York Factory, and over 1200 miles from the Red

River Settlement. In the year 1803 he, by his own admission, married, according to the customs of the country, the daughter of an Indian chief of the Cree nation, named Susanne *Pas-de-nom*. The Cree Indians are a tribe whose territory is on the Elk or Athabaska River, near the lake of the same name, and which is about 300 miles from the Rocky Mountains. They were both minors. After their alleged marriage, and up to the summer of 1831, they appear to have lived together as husband and wife at Rebaska and other posts in the North-West country. It is proved that he continually acknowledged and treated this Cree woman as his wife during twenty eight years, and they had several children. They lived happily, and their conjugal relations, so far as the evidence goes, were those of inviolable fidelity to each other.

In the year 1831, Wm. Connolly, (who, after the amalgamation of the two Companies had become a chief factor and member of Council of the Hudson Bay Company in 1825,) came to Lower Canada with his Indian wife and several of his children. He went with them to reside at St. Eustache, where two of his daughters were baptized by a Catholic priest, to whom, and the principal people of the locality, it seems, Connolly introduced Susanne as his lawful wife. She passed by the name of Mrs. Connolly, and associated with the people of St. Eustache as his wife. After remaining there four or five months, Connolly came with his wife and children to Montreal, and there boarded first with his sister, and afterwards with a Madame Pion. There is no proof to show that any intimation was given to Mrs. Connolly of the occurrence which was about to take place on the 16th May, 1832. The Cree woman was still in Montreal when Connolly on that day married his second cousin, the present Defendant, Julia Woolrich, a lady of good social position and of high respectability. It would appear that the Indian wife felt very sensibly this desertion, and Connolly's marriage to another woman.

The Plaintiff contends that this was a repudiation by Connolly of his lawful wife, and that the second marriage is void. The view which the Court takes of this summary proceeding on the part of Wm. Connolly, and of his subsequent union with Miss Woolrich, will appear in the sequel of these remarks, and by the judgment to be rendered in this case. Some time after these occurrences, Susanne was sent to the Red River Settlement, and was there supported in a convent until her death, in 1862, first by Mr. Connolly, and after he died, in 1849, by the defendant, Julia Woolrich. Of the marriage of Wm. Connolly and J. Woolrich there was issue two children. J. Woolrich died on 27th July,

1865, after making a will dated 28th January, 1861, by which she left several legacies, and amongst others, £30 to *Susanne* and two small legacies to the Indian children, William and Henry Connolly; but the principal part of the property, which was considerable, she bequeathed to her children.

Having adverted thus briefly to a series of facts clearly established, it is proper now to set forth the pretensions of the Defendant more completely than they have been developed in the pleas.

The Defendant's counsel, Mr. Cross, has urged in argument at great length, that the Common law of England prevailed at Rebaska in 1803, and that the testimony in this case does not establish a legal marriage between Wm. Connolly and the Cree woman under and according to that law; that the usages and customs of marriage observed by uncivilized and pagan nations, such as the Crees were, cannot be recognised by this Court as giving validity to a marriage even between the Indians themselves, and more particularly, and much less, between a Christian and one of the natives; that there can be no legal marriage between two parties so situated under the infidel laws and usages of barbarians; that the broad and well recognised principle that the *lex loci contractus* determines the validity of marriages solemnized in Christian countries, according to the laws, sanctions and ceremonies of such countries, does not apply in the present case; can have no application to the connection existing between Mr. Connolly and this Indian woman; that even if the Plaintiff could successfully urge this principle of the law of all christian nations, and one so well known to the common law of England, yet there is no sufficient proof of the existence of any such usage as that contended for, or that the Plaintiff's parents were ever married even according to the customs of the Cree nation; that there is no contract, verbal or written, proved; no solemnization of any marriage established; that the connection of the Plaintiff's parents was fugitive, temporary, dissolvable at pleasure, and had none of the legal or religious characteristics of marriage; that polygamy is one of the incidents or privileges of barbarian life, and that a law *in regard* to marriage which sanctions such an anti-Christian usage, cannot be regarded as a foreign law deserving of recognition by this Court; that no presumption of a marriage can result from the connection of the Plaintiff's parents, because it was broken off by Connolly and was not persisted in till his death, and this argument is urged with double force in this case, as it is proved that by the Indian law, marriage was dissolvable at the will of either party; that the *status* of husband

and wife between Connolly and Julia Woolrich is beyond the reach of question, by a marriage of 30 years; that Susanne and the Plaintiff, her child, acquiesced in this marriage, and that by general repute, and by his baptismal certificate, it is shown that his *status* was that of illegitimacy; that before he could bring this action he should have established a *status* of legitimacy; that the marriage with Julia Woolrich was solemnized according to law; that it is and was legal, and must be so considered till the contrary is judicially declared; that this marriage is an effectual bar to the Plaintiff's pretensions, and finally, that there is not and cannot be by law any community of property resulting from this Indian marriage, evidently illegal; and if legal, none exists by the law of England, which prevailed at Rat River in 1803. There is also another difficulty of a technical character. It was urged that this action should have been brought by all the children of Connolly by his first wife, and not instituted by the Plaintiff alone.

These are succinctly the chief grounds taken by the Defendant; they will be more fully explained hereafter.

Proceeding now to a more minute and lengthened examination of this case, the first question to be disposed of, whether the law of England in regard to marriage prevailed at *Rivière-aux-Rats* in 1803, or whether the law of France or her contiguous colonies, or the Canon law, or the decrees of the Council of Trent, were in force, or whether the Indian custom and usage relative to marriage, constitute the only rule by which this Court can be guided in determining the question of the legality of this marriage between Connolly and the Cree maiden.

Mr. Justice Aylwin and Mr. Justice Johnson have been examined in this cause as witnesses. The former gentleman, produced by the Defendant, says: "At the time of the birth of "the Plaintiff at Rat River, in 1803, the English law prevailed "in the Hudson Bay territory, and has done so ever since— "that is to say, it has prevailed since the Patent of King Charles, "which regulated that country."

Judge Johnson, witness for Plaintiff, in cross-examination, says: "The laws which prevailed throughout the Hudson Bay "territories are the laws of England, with such modifications as "have been made by the local Councils having authority under "the Charter to pass such laws. The English common law was "introduced into the country at the date of the granting of the "Charter to the Company by King Charles."

From this evidence, we are left to infer, according to this high authority, the common law prevails throughout the Hudson Bay

territory in virtue of the Charter generally, and in regard to all the inhabitants or occupants of the territory, whether natives or Europeans.

Mr. Hopkins, witness for Defendant, having been in the service of the Hudson Bay Company for twenty-five years, and a gentleman of great intelligence, testifies that "the laws by "which the Hudson Bay territory is governed are the laws of "England, modified by certain regulations passed by the Council "of the Hudson Bay Company." Mr. Hopkins adds: "*I know "the place called Rebaska from official intercourse, and from "having been in the vicinity of it. It is one of the most remote "districts, and is without the limits of the Hudson Bay Company "territories proper; the jurisdiction of the Company extended "over this post, and still extends over it. We held it up to "within a recent date by separate license.* If the late William "Connolly was stationed there, it was long before my time. I "have no knowledge of the regulations of the Company (if any), "with regard to marriage in that country in 1803."

This testimony, though proceeding from what should be considered good authority, leaves the Court in doubt:—

1st, As to what portion of the laws of England prevailed at *Rivière-aux-Rats* in 1803; to whom they were applicable, and how they were introduced into that particular district of country, though all those gentlemen seem to imply that these laws, whatever they may be or have been, were extended to that locality by the Charter of Charles II.

2nd, As to what modifications had taken place in 1803 and since, in these laws, within the Hudson Bay territory, or at *Rivière-aux-Rats*.

3rd, Whether the Athabaska District, within which is situated *La Rivière-aux-Rats*, was or was not, in 1803, within the chartered limits of the Hudson Bay territories, or under the jurisdiction of the Company, in such a way as to subject it to the laws of England generally, and as stated by the two learned Judges.

4th, As to whether there is a native usage or law of marriage among the Indians, either at *Rivière-aux-Rats* or elsewhere within the chartered limits of the Hudson Bay territories, existing and distinct from the law of England, prevailing in that country.

The Court is bound to respect the testimony of these witnesses; yet I shall proceed to show, I think clearly and conclusively, that the Athabaska District never was within the chartered limits of the Hudson Bay Company; and, moreover, admitting it to be doubtful whether the common law of England obtained within the last-mentioned territory to the full extent stated by the witnesses,

still it is beyond controversy that this law did not prevail in the Athabaska region at *Rivière-aux-Rats* at the time of Connolly's alleged marriage with the Cree woman; and in any case, that the customs of the Cree Indians relative to marriage were in force there at that time. In doing so, it will be necessary for me, in the first place, to advert briefly to the discoveries made and trading posts existing in those vast and remote regions of the North-West, previous to the Charter granted by Charles II. to the Hudson Bay Company in 1670.

Spain, England, and France have been the most conspicuous among the European States in the discovery and colonization of America. About the year 1627 the authority of France was successfully established on the banks of the St. Lawrence, though discovery, hunting, and trading by these Europeans had extended farther west previous to that time. Forty-three years after this date, the Charter of King Charles II. was granted to the Hudson Bay Company; and one hundred years later, the whole of North America belonging to France was finally ceded to Great Britain. Long prior to this grant, and in 1605, Quebec had been established, and had become an important settlement. In the early part of the seventeenth century, anterior to 1630, the Beaver and several other companies had been organized at Quebec for carrying on the fur trade in the West, near and around the great Lakes, and in the North-West territory. The enterprise and trading operations of these companies and the French colonists generally extended over vast regions of the northern and western portions of this continent. They entered into treaties with the Indian tribes and nations, and carried on a lucrative and extensive fur trade with the natives. Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and then only by persuasion and as the fiercer and more barbarous of the Indian nations receded, or when their barbarism had been subdued by contact with the whites, or mitigated by the influences of European civilization. It is quite true they had no right, no lawful authority to do so; yet, as a matter of fact, they appear to have wholly abstained from the exercise of any unjust or arbitrary power in this respect. In the prosecution of their trade and other enterprises, those adventurers evinced great energy, courage, and perseverance. How far they carried their hunting and trading explorations into the interior, I am unable precisely to determine; but I am

inclined to think they had extended them to the Athabaska country, though perhaps not to *Rivière-aux-Rats*, where Connolly was stationed in 1803. The Rat River locality is, as near as I can ascertain, situate in latitude about 58° north, and longitude west from Greenwich about 111°. It is on the north shore of the lake, and about 600 miles from the Hudson Bay Coast. It is due east about 300 miles from the Rocky Mountains, and due north from the boundary line of the United States about 650 miles, and it is nearly the same distance, due south, from the Arctic or Frozen Ocean. Of course the deviations along the existing lines of travel would make the distances by these routes much greater than the estimate here made. As before stated, I have no positive evidence that any French trader or hunter visited the precise locality called *Rivière-aux-Rats* during the sixteenth or the first half of the seventeenth century, though there is every reason to believe they had been there. It is, in my opinion, more than probable, from all I can collect, or learn from a careful examination of the authorities at my command, that some portions of the Athabaska country had, before 1640, been visited and traded in, and, to some extent, occupied by the French colonists and traders in Canada, and their Beaver Company formed in 1629. From that date, during the thirty years which immediately preceded the grant of King Charles II. in 1670, these trading settlements had considerably increased in number and importance. If this be true, it will be seen hereafter that, apart from the question of the Company's limits, the Athabaska region was, by a general clause, excepted from the grant of King Charles; for although neither the laws of France, nor those of her contiguous colonies, may have obtained at those distant settlements in 1670, the date of the Hudson Bay Charter, yet I think it is beyond all doubt that the Athabaska, and other regions bordering on it, belonged to the Crown of France at that time, to the same extent and by the same means, as the countries around Hudson Bay belonged to the Crown of England—that is to say, by discovery, by hunting, and trading explorations,—with this difference, that in the case of the French traders there was a kind of occupation, whereas the English never occupied or settled any part of the Hudson Bay coast till 1669. I will assume, for the purposes of argument, that, in both these cases, the principle of public law applied, viz., that in the case of a colony (though they were not plantations or colonies in the proper or legal sense of the terms) acquired by discovery and occupancy, which is a plantation in the strict and original meaning of the word, the law of the parent states then

in being were immediately and *ipso facto* in force in these new settlements—that is to say, at Athabaska and on the Hudson Bay; and that the discoverers and first inhabitants of these places carried with them their own inalienable birthright, the laws of their country. Yet they took with them only so much of these laws as was applicable to the condition of an infant colony. For the artificial refinements and distinctions incident to the property of a great and commercial people, the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, were neither necessary nor convenient for them, and therefore not in force. The whole of their institutions were also liable to be new modelled and reformed by the general superintending power of the legislature in the mother country, and even this doctrine would apply only to newly-discovered and uninhabited regions.

But in both cases under consideration, the discoverers and first settlers found these wild regions occupied and held by numerous and powerful tribes of Indians; by aboriginal nations, who had been in possession of these countries for ages; and in regard to the Cree Indians, it is stated by a writer who professes to have a familiar knowledge of the natives, (Martin's Hudson Bay, pp. 84-85):

"The Crees are the largest tribe or nation of Indians, and are "divided into two branches—the Crees on the Saskatchewan, and "the Swampies around the borders of Hudson Bay, from Fort "Churchill to East Main. Forty years ago, in consequence of "their early obtainment of firearms, they carried their victories "to the arctic circle and across the Rocky Mountains, and "treated as slaves the Chipewyans, Yellow Knives, Hares, "Dogribs, Loucheux, Nikanies, Dahotanies, and other tribes in "the adjoining regions."

Now, as I said before, even admitting, which the Court cannot, except for the sake of argument, the existence, prior to the Charter of Charles, of the common law of France, and that of England, at these two trading posts or establishments respectively, yet, will it be contended that the territorial rights, political organization such as it was, or the laws and usages of the Indian tribes, were abrogated—that they ceased to exist when these two European nations began to trade with the aboriginal occupants. In my opinion, it is beyond controversy that they were not—that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives. As bearing upon this point, I cannot do better than cite the decision of a learned and

august tribunal—the Supreme Court of the United States. In the celebrated case of *Worcester against the State of Georgia*, (6th Peters Reports, pages 515-542), Chief-Justice Marshall—perhaps one of the greatest lawyers of our times—in delivering the judgment of the Court, said:

"America, separated from Europe by a wide ocean, was "inhabited by a distinct people, divided into separate nations, "independent of each other and of the rest of the world, having "institutions of their own, and governing themselves by their "own laws. It is difficult to comprehend the proposition, that "the inhabitants of either quarter of the globe could have right-"ful original claims of dominion over the inhabitants of the "other, or over the lands they occupied; *or that the discovery "of either by the other should give the discoverer rights in the "country discovered, which annulled the pre-existing rights of "its ancient possessors.*

"After lying concealed for a series of ages, the enterprise of "Europe, guided by nautical science, conducted some of her "adventurous sons into this western world. They found it in "possession of a people who had made small progress in agricul-"ture or manufactures, and whose general employment *was war, hunting, and fishing.*

"Did these adventurers, by sailing along the coast, and occa-"sionally landing on it, acquire for the several governments to "whom they belonged, or by whom they were commissioned, a "rightful property in the soil, from the Atlantic to the Pacific; "or rightful dominion over the numerous people who occupied "it? Or has nature, or the great Creator of all things, conferred "these rights over hunters and fishermen, *on agriculturists and "manufacturers?*

"But power, war, conquest, give rights, which, after posses-"sion, are conceded by the world; and which can never be con-"troverted by those on whom they descend. We proceed, "then, to the actual state of things, having glanced at their "origin, because holding it in our recollection might shed some "light on existing pretensions.

"The great maritime powers of Europe discovered and visited "different parts of this continent at nearly the same time. The "object was too immense for any one of them to grasp the "whole; and the claimants were too powerful to submit to the "exclusive or unreasonable pretensions of any single potentate. "To avoid bloody conflicts, which might terminate disastrously "to all, it was necessary for the nations of Europe to establish "some principle which all would acknowledge, and which should

" decide their respective rights as between themselves. This " principle, suggested by the actual state of things, was, ' that " ' discovery gave title to the government by whose subjects or " ' by whose authority it was made, against all other European " ' governments, which title might be consummated by possession.' " (Johnson *vs.* McIntosh, 8 Wheaton's Rep., 543.

" This principle, acknowledged by all Europeans, because it " was the interest of all to acknowledge it, gave to the nation " making the discovery, as its inevitable consequence, the sole " right of acquiring the soil and of making settlements on it. It " was an exclusive principle which shut out the right of competi- " tion among those who had agreed to it; *not one which could* " *annul the previous rights of those who had not agreed to it.* It " regulated the right given by discovery among the European " discoverers. *but could not affect the rights of those already in* " *possession, either as aboriginal occupants*, or as occupants by " virtue of a discovery made before the memory of man. It " gave the exclusive right to purchase, but did not found that " right on a denial of the right of the possessor to sell.

" The relation between the Europeans and the natives was " determined in each case by the particular government which " asserted and could maintain this pre-emptive privilege in the " particular place. The United States succeeded to all the claims " of Great Britain, both territorial and political; but no attempt, " so far as is known, has been made to enlarge them. So far as " they existed merely in theory, or were in their nature only " exclusive of the claims of other European nations, they still " retain their original character, and remain dormant. So far " as they have been practically exerted, they exist, in fact, are " understood by both parties, are asserted by the one, and ad- " mitted by the other.

" Soon after Great Britain determined on planting colonies in " America, the king granted charters to companies of his subjects " who associated for the purpose of carrying the views of the " crown into effect, and of enriching themselves. The first of " these charters was made *before possession* was taken of any " part of the country. They purport, generally, to convey the " soil, *from the Atlantic to the South Sea.* This soil was " occupied by numerous and warlike nations, equally willing and " able to defend their possessions. The extravagant and absurd " idea, that the *feeble settlements made on the sea coast, or the* " *companies under whom they were made, acquired legitimate* " *power by them to govern the people, or occupy the lands from* " *sea to sea, did not enter the mind of any man.* They were

" well understood to convey the title which, according to the " common law of European sovereigns respecting America, they " might rightfulty convey, and no more. This was the exclusive " right of purchasing such lands as the natives were willing to " sell. The crown could not be understood to grant what the " crown did not affect to claim; nor was it so understood. * * *

" Certain it is, that our history furnishes no example, from " the first settlement of our country, *of any attempt on the part " of the crown to interfere with the internal affairs of the " Indians*, farther than to keep out the agents of foreign powers, " who, as traders or otherwise, might seduce them into foreign " alliances. The king purchased their lands when they were " willing to sell, at a price they were willing to take; but never " coerced a surrender of them. *He also purchased their " alliance and dependence by subsidies; but never intruded into " the interior of their affairs, or interfered with their self " government, so far as respected themselves only.*"

Though speaking more particularly of Indian Lands and Territories, yet the opinion of the Court as to the maintenance of the laws of the Aborigines, is manifest throughout. The principles laid down in this judgment, (and Mr. Justice Story as a member of the Court concurred in this decision), admit of no doubt.

Phillimore in his International Law CCXLI. p. 208, Ed. of 1854 says:—" The nature of Occupation is not confined to any " one class or description; it must be a *beneficial use and " occupation (le travail d'appropriation);* but it may be by a " settlement for the purpose of prosecuting a particular trade, " such as a fishery, or for working mines, or pastoral occupa- " tions, as well as agriculture, though Bynkershoek is correct in " saying, ' *cultura* utique et *cura agri* possessionem quam " maximè indicat.' "

" Vattel justly maintains that the pastoral occupation of the " Arabs entitled them to the exclusive possession of the regions " which they inhabit. ' Si les Arabes pasteurs voulaient cultiver " soigneusement la terre, un moindre espace pourrait leur suffire " Cependant, aucune autre nation n'est en droit de les resserrer, " à moins qu'elle ne manquât absolument de terre; car enfin ils " *possedent* leur pays; ils s'en servent à leur manière; ils en " tirent un usage convenable à leur genre de vie; sur lequel ils " ne reçoivent la loi de personne.' "

" It has been truly observed that, ' agreeably to this rule, the " North American Indians would have been entitled to have " excluded the British fur-traders from their hunting grounds;

" and not having done so, the latter must be considered as having " been admitted to a joint occupation of the territory, and thus " to have become invested with a similar right of excluding " strangers from such portions of the country as their own indus- " trial operations pervade.' "

Authorities might be accumulated on this point, concerning which all writers agree.

Mr. Fox in the great Debate upon his system of Government for India said :—

" It had been often suggested that it would be advisable to " give to the Gentoos the laws of England; but such an attempt " would be ridiculous and chimerical. The customs and religion " of India clashed too much with them."

I have no hesitation in saying that, adopting these views of the question under consideration, (and acquiescing, for the sake of argument, in the pretensions of the Defendant) the Indian political and territorial rights, laws, and usages remained in full force—both at Athabaska and in the Hudson Bay region, previous to the Charter of 1670, and even after that date, as will appear hereafter. I come now to the consideration of that Charter ; for it was indirectly or impliedly contended that it not only introduced the common law of England, but abrogated the Indian customs and usages, within the territories.

Hudson's Bay had been discovered prior to the attempt in which Hudson perished in 1610 ; but from the voyage of Sir Thomas Button, in 1611, till the year 1667, it appears to have been wholly neglected by the English Government and nation. In the latter year, the communication between Canada and the Bay was discovered by two Canadian gentlemen, Messrs. Raddisson and De Groselliers, who were conducted thither across the country by Indians. Succeeding in this, they returned to Quebec, and offered the merchants to conduct ships to Hudson's Bay, the proximity of which to the principal Fur districts, was now ascertained. This proposal was rejected, as well as a subsequent one to the French Government at Paris ; there they were persuaded by the English Ambassador to go to London, where they were favourably received by some merchants, and persons of high rank, who commissioned a Mr. Gillam, long accustomed to the Newfoundland trade, to prosecute the discovery. Mr. Gillam sailed in the Nonsuch, in 1667, into Baffin's Bay, to the height of 75° north latitude, and thence to 51°, where he entered a river, to which he gave the name of Prince Rupert's ; *and finding the Indians friendly*, erected a small Fort. The persons interested in this vessel, upon the return of Gillam, applied

to Charles the Second for a Patent, who granted them the Hudson's Bay Charter, dated the 2nd May, 1670, and from which I make the following extracts:—

The Charter declares—"WE have given, granted, and confirmed, and by these presents, for us, our heirs, and successors, "DO give, grant, and confirm, unto the said Governors and "Company, and their successors, *the sole trade and commerce of* "*all those seas, straits, bays, rivers, lakes, creeks, and sounds,* "*in whatsoever latitude they shall be, that lie within the entrance* "*of the Straits commonly called Hudson's Straits, together with* "*all the lands and territories upon the countries, coasts, and* "*confines of the seas, bays, rivers, lakes, creeks, sounds, afore-* "*said, that are not already actually possessed by or granted to* "*any of our subjects, or possessed by the subjects of any* "*other Christian Prince or State,* with the fishing of all sorts "of fish, whales, sturgeons, aad all other royal fish in the seas, "bays, inlets, and rivers, within the premises, and the fish therein "taken together with the royalty of the sea upon the coasts "within the limits aforesaid, and all mines royal, as well dis- "discovered as not discovered, of gold, silver, gems, and "precious stones, to be found or discovered within the territories, "limits and places aforesaid, and that the said land be from "henceforth reckoned and reputed as one of our plantations or "colonies in America, called 'Rupert's Land.'"

"And further we do by these presents, for us our heirs, and "successors, make, create, and constitute the said Governor and "Company for the time being, and their successors, the true and "absolute lords and proprietors of the same territory, limits, and "places aforesaid, and of all other the premises, saving always "the faith, allegiance, and sovereign dominion due to us, our "heirs and successors, for the same to have, hold, possess, and "enjoy the said territory, limits, and places, and all, and singular "other the premises hereby granted as aforesaid, with their "and every of their rights, members, jurisdictions, prerogatives, "royalties, and appurtenances whatsoever, to them the said "Governor and Company, and their successors for ever to be "holden of us, our heirs and successors, as of our manor of East "Greenwich, in our County of Kent, *in free and common soccage,* "*and not in capite or by knights service; yielding and paying* "*yearly to us, our heirs and succescors for the same, two elks,* "*and two black beavers, wheresoever and so often as we, our* "*heirs and successoss, shall happen to enter into the said* "*countries, territories, and regions hereby granted.*

"And further our will and pleasure is, and by these presents,

" for us, our heirs, and successors, we do grant unto the said " Governor and Company, and to their successors, from time to " time, to assemble themselves, for or about any the matters, " causes, affairs, or business of the said trade, in any place, or " places for the same convenient, within our dominions or else- " where, and there to hold Court for the said Company, and the " affairs thereof; and that, also, it shall and may be lawful to and " for them, and the greater part of them, being so assembled, " and that shall then and there be present, in any such place or " places, whereof the Governor or his Deputy for the time being " to be one."

And the Company has the right " to make, ordain and consti- " tute such and so many reasonable laws, constitutions, orders " and ordinances as to them, or the greater part of them, being " then and there present, shall seem necessary and convenient " for the good government of the said Company, and of all " governors of colonies, forts and plantations, factors, masters, " marines and other officers employed or to be employed in any " of the territories and lands aforesaid, and in any of their " voyages; and for the better advancement and continuance of " the said trade or traffic and plantations, and the same laws, " constitutions, orders and ordinances so made, to put in, use and " execute accordingly, and at their pleasure to revoke and alter " the same or any of them, as the occasion shall require: And " that the said Governor and Company, so often as they shall " make, ordain or establish any such laws, constitutions, orders " and ordinances in such form as aforesaid, shall and may law- " fully impose, ordain, limit, and provide such pains, penalties " and punishments upon all offenders, contrary to such laws, " constitutions, orders and ordinances, or any of them, as to the " said Governor and Company for the time being, or the greater " part of them, then and there being present, the said Governor " or his Deputy being always one, shall seem necessary, requisite " or convenient for the observation of the same laws, constitu- " tions, orders, and ordinances; and the same fines, and amercia- " ments shall and may, by their officers and servants from time " to time to be appointed for that purpose, levy, take and have, " to the use of the said Governor and Company, and their suc- " cessors, without the impediment of us, our heirs, or successors, " or of any the officers or ministers of us, our heirs, or succes- " sors, and without any account therefore to us, our heirs, or " successors, to be made: All and singular which laws, constitu- " tions, orders and ordinances, so as aforesaid to be made, WE " WILL to be duly observed and kept under the pains and penal-

" ties therein to be contained; so always as the said laws, con-
" stitutions, orders and ordinances, fines and amerciaments,
" *be reasonable, and not contrary or repugnant, but as near as*
" *may be agreeable to the laws, statutes or customs of this our*
" *realm.*"

And the " Governor and Company shall have liberty, full
" power and authority to appoint and establish Governors and all
" other officers to govern them, and that the Governor and his
" Council of the several and respective places where the said
" Company shall have plantations, forts, factories, colonies or
" places of trade within any the countries, lands or territories
" hereby granted, may have power to judge *all persons belonging*
" *to the said Governor and Company, or that shall live under*
" *them*, in all causes, whether civil or criminal, according to the
" laws of this kingdom, and to execute justice accordingly; and
" in case any crime or misdemeanor shall be committed in any
" of the said Company's plantations, forts, factories or places of
" trade within the limits aforesaid, where judicature cannot be
" executed for want of a Governor and Council there, then in
" such case it shall and may be lawful for the chief Factor of
" that place and his Council to transmit the party, together with
" the offence, to such other plantation, factory or fort where
" there shall be a Governor and Council, where justice may be
" executed, or into this kingdom of England, as shall be thought
" most convenient, there to receive such punishment as the
" nature of his offence shall deserve."

From these extracts it will be seen:

1. What description of territory, rivers, and sea coasts were ceded; and that the tenure of these extensive regions was to be that of free and common soccage.

2. That the Company had power to make laws and regulations agreeable, in so far as might be, to the laws and customs of the realm.

3. That the English law, civil and criminal, was introduced and made applicable within the territory to all persons belonging to the Company, or living under them; and

4. That territories then already actually possessed or granted to any British subjects, or possessed by the subjects of any other Christian Prince or State, were excepted from the grant.

It is no part of my duty, upon the present occasion, to offer any opinion upon the validity of this extraordinary Charter, though that point is not without interest in this case; and it is worthy of note, that some of its clauses have given rise to doubts among lawyers, and have been the occasion for considerable

controversy both in England and in this country. Several modes of testing the question have been suggested; but as yet, none have been adopted. Apart from the immense and irresponsible powers conferred upon the Company, it has been contended that the grant in free and common soccage of such extensive regions of territory in the actual possession of aboriginal and powerful nations was not in the power of the crown, and was a violation of the plainest principles of public international law. Some have gone further, and contended that without the authority of Parliament such a grant of land and exclusive privileges and monopoly could not be made; that the concession of the exclusive right of trade with the Indian tribes was an illegal exercise of the Royal Prerogative; that the Company have never carried out the intentions of the Crown, either by proper attempts to find a north-west passage to the Southern Ocean, or by making useful discoveries and planting, settling, and colonizing the territory; that they have not attempted, by even ordinary means, to civilize the natives; nor have they, by judicious and appropriate regulations, laws, and government, endeavoured to render such a vast and important dominion of the Crown beneficial to the Parent State. The Company, when called upon from time to time, have answered these charges more or less successfully; and they have further urged that in the reign following that in which this Charter was granted, the cession received the confirmation of Parliament; but it was specially provided that the Act of confirmation should only remain in force for the period of seven years, "and from thence to the next session of Parliament, and no longer." After this, no re-confirmation of the Charter by Parliament ever took place, though its existence has frequently been incidentally recognized in Acts of that body, and among others may be noticed the following:—By an Act of Parliament of Great Britain (43 George III., chap. cxxxviii.), passed in August, 1803, it was provided that crimes committed within the Indian territories, which, though not conveyed by Charter to the Company, have long been leased to them, should be cognizable by the Courts of Upper and Lower Canada. The preamble of this Act recites that crimes and offences committed within the Indian territories were not cognizable by any jurisdiction whatever. In 1821, an Act (1 and 1 George IV., chap. lxvi.) was passed extending the provisions of the above-named Act to crimes and offences committed within the territory covered by the Company's Charter, anything "in any grant or Charter to the Company to the con-" trary notwithstanding." This latter Act also gave to the

Canadian Courts a right of jurisdiction within the Indian territory, as well as over Rupert's Land, which is covered by the Company's Charter. All this may give rise to interesting investigations hereafter.

But for the purposes of this case, I take the Charter as I find it, and regard it as legally conceding territory and introducing the Common Law of England, with a restricted application within the limits of the grant. And conceding this, it becomes necessary, in the first place, to enquire whether the Athabaska region was included within the Chartered limits of the Company or not. Mr. Hopkins, a witness for the defendant, says it was not; but there is a qualification in his evidence which renders his meaning in some degree doubtful. Let us look a little closer into this matter, and see if the fact can be ascertained, or the doubt be reasonably solved; and here it may be proper to remark, once for all, that the western boundaries of the territory have never, so far as I can ascertain, been clearly settled or defined by either judicial decision or otherwise. Before proceeding however to advert more particularly to this question, it may not be out of place to refer to the opinions of some of the most eminent lawyers in England in regard to this difficulty of boundary which is not new, and which has arisen under circumstances to which it is unnecessary for the Court to refer.

Lord Brougham and his associate Counsel, consulted in 1814 by the North-West Company, were of opinion, that the territorial grant was not intended to comprehend all the lands and territories that might be approached through Hudson's Straits by land or by water, but must be limited to the relation of proximity to the Straits, and to the confines of the coasts of the Bay within the Straits; and, likewise, that the boundary must be such a one as is consistent with that view, and with the professed objects of a trading company, intended, not to found kingdoms and establish states, but to carry on fisheries in their waters, and to trade and traffic for the acquisition of furs, peltries, &c.; and they add, that as one hundred and fifty years had then elapsed since the grant of the Charter, it must have been ascertained by the actual occupation of the Company what portion or portions of lands and territories in the vicinity, and on the coast and confines of the waters mentioned and described as within the Straits, they had found necessary for their purposes, and for forts, factories, towns, villages, settlements, or such other establishments in such vicinity and on such coasts and confines as pertain and belong to a company established for the purposes mentioned in their charter, and necessary, useful, and convenient to them, within these

prescribed limits, for the prosecution of these purposes; and they say, that the enormous extension of land now claimed (and they had reference only to the Red River District transferred in 1812 by the Company to Lord Selkirk; for no pretence was ever made by the Hudson Bay Company that Rebaska, Rat River, or Athabaska was within the Chartered boundaries, till it was first put forth in this case,) appears, therefore, not to be warranted by any sound construction of the Charter.

Sir Samuel Romilly, Scarlett, afterwards Lord Abinger, and others consulted, in 1814, by the Hudson's Bay Company, were of opinion that the grant of the land contained in the charter was good, and that, moreover, it would include all the countries, the waters of which flow into Hudson's Bay.

All this is pretty vague; and what is most apparent and precise, in these opinions, is the different way in which they view the charter, and the Western limits of the Company's territories. The charter grants the right of exclusive trade and commerce of all *seas, straits, rivers, &c.*, that *lie within the entrance of Hudson Straits*; also, together with all the lands and territories *upon the* countries, coasts and confines of the sea, bays, lakes, rivers, creeks, and sounds aforesaid. It seems to me, if these words, taken together, are susceptible of any reasonable construction or interpretation at all, they were intended to concede a vast extent of country, round the whole coast of Hudson's Bay and the rivers flowing into it. That all the regions westward from the shores of the Bay along the great rivers flowing into it, so far as those streams are navigable for the purpose of trade and commerce, are included in the grant; in other words, their limits extend as far west as the head of the water-shed, where navigation ceases, in longitude west, 95.

Assuming this view to be correct, yet the Athabaska region would not be included within the western boundaries of the Company's territory. The Elk, or Athabaska River, rises in the Rocky Mountains; and, after flowing north and west 300 miles, discharges its waters into Lake Athabaska, otherwise known as the Lake of the Hills. By two outlets, the waters of Lake Athabaska flow into Peace River, an affluent of the MacKenzie, and through it to the Frozen Ocean. It is idle, therefore, in the opinion of the Court to contend that this river, was ever within the chartered limits of the Hudson's Bay territories.

Before leaving this branch of the case, it may be proper to refer to the treaty of Ryswick, in 1697, between Great Britain and France, and also to the treaty of Utretcht, between the same powers, in 1713.

By the 7th and 8th articles of the former treaty it is declared and agreed that:—

"VII. And in like manner the Kings of Great Britain shall "restore to the most Christian King all countries, islands, forts, "and colonies, wheresoever situated, which the French did possess "before the said declaration of war; and this restitution shall be "made on both sides, within the space of six months, or sooner "if it can be done. And to that end, immediately after the ratification of this treaty, each of the said Kings shall deliver, or "cause to be delivered, to the other, or to commissioners authorized in his name for that purpose, all acts of concession, instruments, and necessary orders, duly made and in proper form, so "that they may have their effect."

"VIII. Commissioners shall be appointed on both sides, to "examine and determine the rights and pretensions which either "of the said Kings had to the places situated in Hudson's Bay; "but the possession of those places which were taken by the "French, during the peace that preceded this present war, and "were retaken by the English during this war, *shall be left to the "French*, by virtue of the *foregoing article*." These commissioners were named, but never reported.

By the 10th article of the treaty of Utretcht it is provided that:—

"X. The said most Christian King shall restore to the king-"dom and Queen of Great Britain, *to be possessed in full right "for ever, the bay and straights of Hudson, together with all "lands, seas, sea-coasts, rivers, and places situate in the said bay "and straits, and which belong thereunto, no tracts of lands "or of sea being excepted, which are at present possessed by the "French subjects of France*."

The Hudson's Bay territory, as described in the latter treaty, would seem to be restricted to the limits contended for by Lord Brougham, rather than to those laid down by Sir Samuel Romilly; and in any case, I believe, the Athabaska region was beyond and without the chartered limits of the Company, and could not therefore come under the operation of that grant. There may, moreover, be urged another reason, and, in my opinion, successfully, why the Athabaska region should be excluded from the limits of the Hudson Bay territory, and an argument more cogent than that to be found in the vague and doubtful terms of the Charter. It is declared by that remarkable instrument, that the grant is made of all those seas, bays, straits, &c., together with all lands and territories, &c., that are not already actually possessed by or granted to any of our subjects, *or possessed by the subjects of*

any other Christian Prince or State. Now, as I have before stated, it appears to me to be beyond controversy that, in 1670, the Athabaska country belonged to the Crown of France. It had previously been discovered by French colonists, and been more or less explored by these adventurers and the trading companies of New and Old France. It is true their settlement and occupation was not precisely that of colonists; but they were traders with trading posts, explorers, hunters, discoverers, carrying on a trading intercourse with the natives. If this be true, and there can be no doubt of it, the region in question was expressly excepted out of that grant; and such was the opinion of Lord Brougham and his associate Counsel.

But admitting, for the purpose of conceding to the defendant all that can be granted, that in 1803, the Athabaska district was included within the western limits of the Hudson Bay territories, still that portion of the Common Law of England which would prevail there, had a very restricted application—it could be administered and enforced only among and in favor of, and against those "*who belonged to the Company or were living under them.*" It did not apply to the Indians, nor were the native laws or customs abolished or modified, and this is unquestionably true in regard to their civil rights. It is easy to conceive, in the case of joint occupation of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time, make it applicable generally or indiscriminately—it did not abrogate the Indian laws and usages. The Crown has not done so. Their laws of marriage existed and exist under the sanction and protection of the Crown of England, and Mr. Connolly might bind himself as well by that law, as by the Common Law of England.

But, it is contended that, by the treaty of Paris, in 1763, by which all the French possessions on the continent of America were ceded by France to Great Britain, the North-West was brought, not only under the dominion of England, but the common law of the realm was *ipso facto* introduced into that country.

As a matter of fact and of public law, the treaty in question effected no such change in the laws of the territory. It will be observed that between 1670 and 1763 nearly one hundred years had elapsed, and during that period the French colonists, and French trading companies, had made settlements and established trading posts as far as the Rocky Mountains; that these countries

were in the occupation of the French, and that no change could take place in their laws, or in the Indian usages, except by the express will of the conqueror, or of the sovereign to whom the cession was made. I find in the proclamation in pursuance of that treaty, dated 7th October, 1763, the following clauses :—

"And we do further declare it to be our royal will and "pleasure, for the present, as aforesaid, to reserve under our "sovereignty, protection, and dominion, for the use of the said "Indians, all the land and territories not included within the "limits of our said three new governments, or within the limits of "the territory granted to the Hudson's Bay Company; as also "all the land and territories lying to the westward of the sources "of the rivers which fall into the sea from the west and north-"west as aforesaid; and we do hereby strictly forbid, on pain of "our displeasure, all our loving subjects from making any pur-"chases *or settlements whatever*, or taking possession of any of "the lands above reserved without our especial leave and licence "for that purpose first obtained."

There is nothing to be found in this, or in any subsequent proclamation, abolishing or changing the customs of the Indians or the laws of the French settlers, whatever they may have been; nothing which introduced the English common law into these territories. When Connolly went to Athabaska, in 1803, he found the Indian usages as they had existed for ages, unchanged by European power or Christian legislation. He did not take English law with him, for his settlement there was not preceded by discoveries made either by himself or English adventurers, nor was it an uninhabited or unoccupied territory. This pretension of the Defendant, therefore, that, to the exclusion of the laws and customs of the natives, the common law of England prevailed at Rat River, in 1803, or at any subsequent period, must be over-ruled.

I have dwelt upon this branch of the case at greater length than it would seem to require, through deference for the arguments of the Defendant's counsel, and not because the question is one presenting any difficulty, or in the opinion of the Court susceptible of a doubt. The Plaintiff's counsel seemed to attach very little importance to it, either because they thought it too clear, or perhaps immaterial.

I come now to the facts, and the law of the case claiming more close and anxious consideration.

Before, however, proceeding any further, it may be well to state some general principles applicable to the law of marriage; how that institution was considered and what were the ceremonies

observed in solemnizing matrimony among the principal nations of Europe prior to the Council of Trent, the ordinances of the French Kings, and the British Marriage Acts as they are called. As none of these laws were ever promulgated, or in force at Rat River, we need not carry our investigations into the religious customs or observances of more recent times.

By the law of nature, a man and a woman without religion or law, have the right, it is said, to form a union upon such conditions as they may chose to impose. By the law of nations, all communities which observe that law, have agreed to recognize as husband and wife persons of the opposite sexes, who in their union have observed and fulfilled all the laws in force relative to matrimony, in the country which they inhabit or where the union is formed; and by the Civil law, each nation has established certain formalities upon the observance of which the validity of marriage depends. In a state of nature the contract has been defined as *Contractus quo personæ corporum suorum dominium mutuo tradunt et recipiant.* By the Civil law it has been regarded as *Contractus quo legitima personæ riti et mutuo corporum suorum dominium et recipiant.* So far as marriage requires religious sanction, it may be considered *maris and feminæ conjunctio individuæ vitæ retinens secundum prescriptum legum divinarum et humanarum ad usum conjugalem.*

Among the chosen people and the heathen nations of antiquity before the teachings of Christ, marriage in many respects was not unlike that described as existing among the aboriginal inhabitants of this continent. We must in regard to many of these nations always except the facility of divorce and repudiation. Among some of the barbarians of North America, marriage is said to be dissolvable at pleasure—at the will or caprice of either party—the meaning of which is, I presume, that the causes which justify divorce are very numerous; and that the formalities to be observed in the exercise of this mutual right of repudiation, are very few. It is a question of degree; more or less; and so far it is different from the law of divorce as it obtains and has obtained among many civilised and christian nations.

It seems to be admitted among all Christians, that our Saviour imparted to marriage a more solemn and sacred character than it previously possessed; and the Roman Catholic Theologians and Councils hold, that it was elevated by Him to the dignity of a Sacrament, and that the bond was rendered indissoluble. I have no good reason to doubt but that this has been the doctrine of the Church of Rome, upon the two first points from the time of the

Apostles to the present day; in fact we have the authority of Tertullian, who wrote in the middle of the Second Century, and of many later fathers, that this was the doctrine of the Church: though of course, it was extremely difficult to impress these doctrines in all their strength and purity upon nations passing from Paganism to Christianity, or to enforce their strict observance amidst the corruptions and violence of a vast Empire perishing from the effeminacy and licentiousness of its people. The Church came in at the decline: while she prepared to encounter with weapons more powerful than those of man, the wrath of the barbarians, advancing now to the destruction of Roman power and Roman civilization, her work of conversion was still incomplete, and her doctrines not entirely or inadequately asserted. Perhaps during the Centuries of disorder, licentiousness and violence which preceded and followed the final overthrowing of the Western Empire, it was impossible to inculcate or to enforce those doctrines which were defined and promulgated in later and more Christian times. I am not called upon to determine that question, but in order to appreciate in a religious point of view one peculiarity of this Indian marriage, that of having taken place by mere consent without rites or ceremony, it becomes necessary for the Court to refer to some of the laws of the Christian Emperors and to Epistles and decretals of the Popes. Constantine, the first Emperor who acknowledged Christianity on the throne, and many of his successors, expressly recognize divorce in their laws. We have several collections of of Roman laws since the Empire became Christian, which define what marriage was under these laws:—1st. The Theodosian Code which was published in 438, and 2nd, the Code of Justinian and other parts of his legislation;—in them will be found, in the greatest detail, what constituted a legal marriage. In the Institutes, we find the following:

"Justas nuptias inter se cives romani contrahunt, qui secun-
"dùm præcepta legum coëunt: masculi quidem puberes, fœminæ
"autem viripotentes sive patres-familiarum sint, sive filii-fami-
"liarum. Dum tamen, si filii-familiarum sint, consenssum habeant
"parentum, quorum in potestate sunt. *Instit. lib.* I, *tit.* X, *in*
"*prine.*"

This is what the Digest calls the nuptial rite—the essential and legal rite. In a law of Theodorius, we find the following:

"Si donationum antè nuptias, vel dotis instrumenta defuerint,
"pompa etiam, *aliaque nuptiarum celebritas* omittatur, nullus
"æstimet ob id deesse, rectè aliàs inito matrimonio, firmitatem,
"vel ex eo natis liberis jura posse legitimorum auferri, si inter

" pares honestate personas, nullâ lege impediente, fiat consortium, " quod ipsorum consensu, atque amicorum fide firmatur." *Cod. " Theod. lib.* III, *tit.* 7, *l.* 3."

This the famous doctrine of Theodorius, the younger, promulmulgated 428, and inserted in the Theodorian Code. It was afterwards adopted by Justinian. We find these words in the third chapter of the 22nd Novel:

" *Nuptias* itaque *affectus alternus facit*, *dotalium* non egenis " augmento. Cùm enim semel convenerint sub puro nuptia " affectu, sive etiam oblatione dotis, et propter nuptias dona- " tionis; oportet causam omnino sequi etiam solutionem aut " innoxiam, aut cum pœnâ."

It will be borne in mind that these pecuniary arrangements were not essential to the marriage contract; but they were regarded as evidences of consent and their omission gave rise to serious difficulties. In his 74th Novel. (App. 4) we find the law which defines more in detail than any other what shall constitute a legal marriage; but nothing is said there about any religious ceremony. He says:

" Et antiquis promulgatum est legibus, et à nobis ipsis sunt " hœc eadem constituta, *ut etiam nuptiæ extrà dotalia docu-* " *menta ex solo affectu valeant et rate sint.* Cap. IV. in princ.

" Introëuntes testes sine periculo mentientes, quia vir vocabat " *dominam* cohœrentem, et illa ullum similiter nominabat; et sic " eis finguntur matrimonia non pro veritate confecta. *Ibid.*

" In majoribus itaque dignitatibus, et quæcumque usque ad " nos et senatores et magnificentissimos illustres, neque fieri hæc " omnino patimur; sed sit omnino et dos, et antenuptialis donatio, " et omnia quæ honestiora decent nomina. Quantùm vero in " militiis honestioribus et negotiis, et omnino professionibus " dignioribus est, si voluerit legitimè uxori copulari, et non facere " nuptialia documenta, non sic quandocumque et sine cautelâ, " effusè et sine probatione hoc agat, sed veniat ad quandam ora- " tionis domum, et fateatur sanctissimæ illius ecclesiæ defensori: " ille autem adhibens tres aut quatuor exinde reverendissimorum, " clericorum, attestationem conficiat declarentem, *quia sub illâ* " *indictione*, *illo mense*, *illâ die mensis*, *illo imperii nostri anno*, " *consule illo*, *venerunt apud eum in illam orationis domum ille* " *et illa*, *et conjuncti sunt alterutri*, *etc.* Eod. cap. § 1."

This legislation continued until the reign of Leon VI, Emperor of the East, in 911. In the West the nuptial benediction was rendered necessary much earlier. In his Capitularies, Charlemagne, in 802, established by law the necessity of the nuptial benediction and the indissolubility of marriage. But,

notwithstanding these laws, I think it is beyond doubt that marriages were held to be valid without this religious ceremony, and that too, immediately and long after the promulgation of the Capitularies. The authority of Popes and Bishops would perhaps be considered sufficient to establish that fact in a matter of this kind. I find in the reply of Nicholas I, in 866, to the Bulgarians, after stating the ceremonial required in the Catholic Church to be very much the same as it now is. The following words are to be found in the conclusion :

" Hæc sunt jura nuptiarum ; hæc sunt, præter alia quæ nunc " ad memoriam non occurrunt, pacta conjugionum solemnia. " Peccatum autem esse, si hæc cuncta in nuptiali fœdere non " interveniant, non dicimus, quemadmodùm Græcos vos æstimare " dicitis ; præsertim cùm tanta soleat arctare quosdam rerum " inopia, ut ad hæc præparanda, nullum his suffragetur auxilium: " *ac per hoc sufficiat secundùm leges salus eorum consensus, de* " *quorum conjunctionibus agitur*. Qui consensus si solus in nup- " tiis fortè defuerit, cætera omnia, etiam cum ipso coïtu celebrata, " frustrantur ; Joanne Chrysostomo, magno doctore, testante, " qui aït ; Matrimonium non facit coïtus, sed voluntas. Ibid."

Pope Adrian the Second, successor of Nicholas, was applied to, that he might determine whether a certain marriage, celebrated without the presence of a priest, was or was not valid ; and he wrote to the Bishop of the Diocese in the following words :

" Ut autem omnis quæstio super eodem matrimonio de cætero " sopiatur, per apostolica tibi scripta mandamus, quatenùs hujus- " modi connubium dissolvi nullatenùs patiaris, sed firmum facias " atque inviolabile permanere. Si enim aliàs personæ conve- " nientes et legitimæ fuerint, et contractus ipse legibus concor- " dans, ita quod non videatur ei de sacris canonibus obviare ; " *pro eo quod sacerdos absens fuerit, tale matrimonium non* " *debet ullatenùs impediri.* Ibid.

There does not appear to have been any peculiar circumstances about this marriage, except the absence of the Priest ; it is to be remembered however, that several witnesses were present. Pope Alexander the Third, writing to the Bishop of Salerno, says :—

" Inquisitioni tuæ taliter respondemus, quo si legitimus con- "sensus à solemnitate quæ fieri solet, præsente sacerdote, *aut* " *etiam ejus notario, sicut etiam in quibusdam locis adhuc obser-* " *vatur*, coram idoneis testibus interveniat de præsenti, ita quod " unus alium in suum mutuo consensu verbis expressis recipiat, " utrinque dicendo : Ego te recipio in meam, et ego te recipio in " meam, et ego te in meum ; sive sit juramentum, sive non, non " licet mulieri alii nubere, etc.—Conc. Labb. t. X, col. 1574."

The same Pope in writing to an English Prelate, the Bishop of Norwich, makes the following remarks:—

"Super eo quod ex tuis litteris intelleximus virum quemdam "et mulierem, de mandato Domini utriusque, sese invicem rece- "pisse, *nullo sacerdote præsente, nec adhibitâ solemnitate, "quam solet Anglicana ecclesia exhibere* et aliam mulierem ante "carnalem commixionem solemniter duxisse et cognovisse; tuæ "prudentiæ taliter duximus respondendum, quod si primus vir "et mulier ipsa pari consensu de presenti sese receperint, dicendo "unus alteri: Ego te recipio in meum, et ego te recipio in "meam; etiamsi non intercesserit ulla solemnitas, nec vir mulierem "carnaliter cognoverit, mulier ipsa primo debet restitui, cùm nec "potuerit, nec debuerit, post talem consensum, alii nubere.— "Antonii Augustini antiquæ decretalium collectiones. Paris. "1621, p. 103."

Innocent the Third, replying to the Bishop of Brent, says:—

"Postulasti utrùm ex solis verbis, et ex quibus matrimonium "contrahatur. Nos igitur inquisitioni tuæ taliter respondemus, "quod matrimonium in veritate contrahitur per legitimum viri "et mulieris consensum: sed necessaria sunt, quantùm ad eccle- "siam, verba consensum exprimentia *de presenti*.—Decretal. "Greg. IX, de spons. et matr. cap. 25."

In the decretals we find the marriage *per verba de præsenti* referred to in language the most precise. It may take place before the priest, or before the relatives and friends of the parties: this kind of marriage may take place without witnesses, provided both parties admit the fact, and even may be proved by a simple presumption arising from cohabitation. It would be fatiguing to cite authorities in support of this view of the Canon law, as it stood in earlier times. It can be easily understood that, as at Rat River—it was not always possible to have any other form of marriage—and under peculiar circumstances there can be no doubt, that such marriages were regarded as valid by the Canon law.

These quotations are given to exhibit some of the legislation of the early Christian Emperors in regard to marriage, and to prove also what were the opinions of some of the most learned and illustrious among the Popes of Rome; and finally what were the principles of the earlier Canon law in this respect. Of course neither these laws nor the opinions of the Popes, necessarily convey what were the doctrines of the Church, but they are worthy of note in a case like the present; they show that consent was the main element in the contract, that no religions or other ceremonies were in every case essential. In

the course of time the Ecclesiastical power became more strict: and the doctrines of the Church, on these subjects, among others, were defined and promulgated in the decrees of the Council of Trent. It is unnecessary for me to speak of these decrees, they were never published in England or France, much less in the North West or Athabaska territory,

We come now to enquire what was the Common law of England in respect to marriage; and what are the forms requisite in France and Scotland.

In France, before the Revolution, the form of marriage was of a mixed nature, and it was held, by lawyers, that the essence of the marriage consisted rather in the civil contract than in the sacrament or religious solemnization; for the marriage law of France was derived from the ancient canon law, subject to regulations of the provincial councils of the kingdom, agreeably to the independence of the Gallican church, and subject also to the control of the monarch. None of the ordinances and declarations of ancient France embody and enforce, in express terms, the provisions of Papal bulls and the Tridentine decrees relative to marriage. In an edict of Henry IV., 1606, there seems to be a recognition of the authority of the Council. The substitution of the civil magistrate for the ecclesiastics appears to constitute the principal differences between the rules observed during the *ancien regime* and those of the *code civil*; each exhibiting an equal precaution in their preliminary forms; and parental right is scrupulously maintained; for the declaration of the 24th session of the Council of Trent, which rendered the consent of parents unnecessary for the validity of marriage, was protested against on the part of France, and was virtually disavowed by the *Ordonnance de Blois*, in 1579, and by the subsequent royal edicts on that particular point. According to the civil code of France, it seems that a domicile of six months is a necessary qualification for marriage; after which a municipal officer of the commune of the domicile, at the door of the hall of the commune, publishes the names, residence, and age of the parties intended to marry, and the names and residence of parents. After this publication, a public act is drawn up, setting forth the description of the parties, and the day, time, and place of the publication, a copy of which remains fixed on the door of the hall of the commune, until the end of eight successive days, when the publication is to be repeated with the same formalities. After a lapse of three complete days from the last publication, the marriage may be celebrated on a day appointed by the parties at the hall of the commune, by the municipal

officer, in the presence of four witnesses. The officer, after addressing the parties on the subject of their duties, receives their separate declaration that they take each other for husband and wife, and then, in the name of the law, pronounces them to be united in marriage, and a public act is immediately drawn up and recorded. According to the law of France, it is only in virtue of this act that the rights belonging to marriage can be maintained in that country, so that, like the marriage act of England, the law of France, as to the form of marriage, is not merely directory, but prohibitory also; admitting (as it seems) no marriage to be valid that has been contracted within the territory according to any other form than that prescribed by the civil code of the kingdom.

The decree of the Council of Trent was never recognized in Scotland. In marriages at Gretna Green, a blacksmith has supplied the place of a priest or a magistrate.

By the canon law, there being as before mentioned, a distinction between the contract *de præsenti* and promise *de futuro*; the former constituting a good marriage of itself; the other not, unless followed by *copula* or some other act which is held in law to amount to the carrying the promise into effect: and this canon law prevailing in Scotland, Lord Stowell adjudged that under the Scotch law, the contract *de præsenti* does not require consummation in order to become "very matrimony;" that it does *ipso facto et ipso jure* constitute the relation of man and wife. (Dalrymple *vs.* Dalrymple, 2 Haggard's C. R. 54; 4 Eng. Eccl. Rep. 485.) This position was approved in the House of Lords. (McAdam *vs.* Walker, &c., 1 Dow. 182.)

By force of such a contract in Scotland (without religious celebration), Lord Stowell, in the Dalrymple case, pronounced Miss Gordon the legal wife of Mr. Dalrymple, an English officer, who, after making in Scotland a contract of marriage with her, was married in England to Miss Manners, the sister of the Duchess of St. Albans.

In Spain the decrees of the Council of Trent were received and promulgated by Philip II. in his European dominions. But the laws applicable to her colonies consisted of a code issued by the Council of the Indians antecedent to the Council of Trent, and are to be found in the code or treatise called *Las Siete Partidas* and the laws of Toro. The law of marriage as contained in the *Partidas* is, that "*consent alone, joined with the will to marry, constitutes marriage.*" (10 How. 182.)

It is matter of history that many marriages were contracted in the presence of civil magistrates and without the sanction of a

priest in Spanish colonies, which have since been ceded to the United States. (Id. 180.)

Whether an actual contract of marriage, made before a civil magistrate (and followed by cohabitation and acknowledgment), but without the presence of a priest, was valid, and the offspring thereof legitimate according to the laws in force in the Spanish colonies previous to their cession to the United States, was a question in Hallett, &c., *vs.* Collins, and it was determined in the affirmative.

But it may be asked, what were the nature and obligatory force of a contract *per verba de præsenti* by the English common law, previous to the passing of the Marriage Act, in the 26 Geo. II.?

It was supposed by Gibbs, C. J. of the Common Pleas, that before that Act, marriages in England were governed by the canon law, and that a contract of marriage entered into *per verba de præsenti*, should be considered an actual marriage if followed by cohabitation. (Lautour, &c., *vs.* Teesdale and wife. 8 Taunt. 830, 4 Eng. Com. Law, Rep. 299.) Lord Ellenborough also thought that a contract of marriage *per verba de præsenti* would have bound the parties before that Act. (King *vs.* Brampton, 10 East 288.) And the opinion of Gibbs, C. J., has some support in the language of Sir William Scott, in Dalrymple *vs.* Dalrymple. But in that case, it was of no importance whether or no the canon law of Europe was introduced into England as part of its law; the only question in the Dalrymple case, in respect to the canon law, being whether it was introduced into the law of Scotland.

In the United States, the Courts of several of the States have gone quite as far as Chief Justice Gibbs. Thus it has been laid down by the Supreme Court of New York, that a contract of marriage made *per verba de præsenti* amounts to an actual marriage, and is as valid as if made in *facie ecclesiæ*, (Fenton *vs.* Reed, 4 Johns. 52; Jackson *vs.* Winne, 7 Wend. 47); and by the Supreme Court of Pennsylvania, that marriage is a civil contract which may be completed by any words in the present time without regard to form. (Hantz *vs.* Sealy, 6 Binn. 405: Patterson *vs.* Gaines and wife. 6 How. 587.) And upon the ground that parties have power to contract marriage *inter se*, without the intervention of a clergyman—that such is the common law—the Supreme Court of New York, in the absence of proof to the contrary, presumed this to be the law of Connecticut at the time of the marriage, which was in question in Starr, &c., *vs.* Peck, I Hill 271.

To the view of the common law of England, acted upon in

the American Union—the same taken by Chancellor Kent in his commentaries, and Judge Story in his treatise on the Conflict of Laws—Lord Campbell, in the case of The Queen *vs.* Millis, called attention in the House of Lords to the fact that the United States "carried the common law of England along with them, and jurisprudence is the department of human knowledge, to which, as pointed out by Burke, they have chiefly devoted themselves, and in which they have chiefly excelled." (10 Clark & Finn. 777.) A view of the law different from that which Lord Campbell sought to enforce was taken by Chief Justice Tindal. This Judge, who, for learning and ability, Lord Campbell has pronounced, is not inferior to the most distinguished of his predecessors, endeavoured, in the case of The Queen *vs.* Millis, to show that the law by which the spiritual courts of England have from the earliest time been governed and regulated, is not the general canon law of Europe imported as a body of law into England, and governing those courts *propria vigore*, but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical constitutions of the English bishops and archbishops, and by the legislature of the realm, and which has been known from early times by the distinguishing title of the king's ecclesiastical law. (10 Clark & Fin. 678.)

The opinion of a majority of the common law judges of England, as delivered by Chief Justice Tindal, was, that by the law of England, as it existed at the time of the passing of the Marriage Act (1753), a contract of marriage *per verba de præsenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties by application to the spiritual court the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The opinion delivered by Tindal, C.J., was dissented from by Lord Brougham in the House of Lords; he thought it reasonable to presume that the English law touching marriage was the same with the general law of catholic Europe, until it was shown that England had receded from that law. (P. 722.) He considered that she had not so receded until the Marriage Act; and therefore, that until that Act, the English law agreeing with that of all Europe, a marriage *per verba de præsenti* was valid without the intervention of a priest. (P. 732.) With Lord Brougham concurred Lord Campbell (p. 746) and Lord Denman (p. 804). These three judges were of opinion that before Lord

Hardwicke's Act of 1753, a contract *per verba de præsenti* was, by the English law, a good marriage, *ipsum matrimonium*, (p. 829); Lord Campbell distinguishing between the case of a mere betrothment; a mere executory contract *per verba de præsenti* for a marriage thereafter to be solemnized, the parties not meaning to be husband and wife until such solemnization; and the case of *nuptiæ per verba de præsenti* without any contemplation of a future ceremony as necessary to complete the relation of husband and wife, (p. 749.) But the Chancellor (Lord Lyndhurst) did not consider that by the law of England, previous to the Marriage Act, a contract of present marriage had so great an effect as was ascribed to it by these three judges. He considered such a contract a marriage for many, but not for all purposes; and that in order to constitute a marriage in its complete and perfect state, solemnization was necessary. (P. 844, 5.) Lord Cottenham laid down that the consequences of a valid marriage must be, 1st, to give to the woman the right of a wife in respect to dower; 2nd, to give to the man the right of a husband in the property of the woman; 3rd, to give to the issue the right of legitimacy; 4th, to impose upon the woman the incapacities of coverture; 5th, to make the marriage of either of the parties living the other with the third person void; and then he proceeded to show by authority that none of these consequences followed from a mere contract of marriage *per verba de præsenti*. (P. 878.)

Lord Abinger concurring with Lords Lyndhurst and Cottenham, the votes were equal—that is, three for reversing and three for affirming. According to the ancient rule in the law, *semper præsumitur pro negante*, the House affirmed the judgment of the Court of Queen's Bench in Ireland, holding that a contract of marriage *per verba de præsenti* in the presence of witnesses does not, in England or Ireland, constitute a valid marriage at the common law, unless it be also in the presence of a regularly ordained minister; and, consequently, holding the accused who, after such a contract with one woman, married another, not to be guilty of bigamy. (P. 907.) By the authority of this decision, the Court of Exchequer has said it was bound. (Catherwood *vs.* Caslon, 13 M. & W. 261.)

The laws which control marriage in civilized countries are intended to operate as a protection and not a prohibition. It is to be presumed that parties in barbarous or foreign countries, are to be entitled to an exemption from the strict rule, whenever it is shown that insupportable obstacles alone had occasioned the deviation from established forms; and it appears at the same time

that the marriage, although irregularly had, is in fact a *bona fide* marriage, free from all suspicion of fraud and clandestinity; for the law of England, in prescribing a form for its own subjects, does not compel them to impossibilities; and it is difficult to suppose, when a marriage is shown to be complete according to general law, that it could be held to be a nullity, merely on account of a deviation in point of local form, arising out of circumstances which it was not in the power of the party to control, more especially as to deny to parties so situated the rights which, according to natural law belong to every free agent, would have an immediate tendency towards encouraging those unlawful connexions which are injurious to society, and subversive of morals and religion. But however limited the degree of indulgence permitted in this respect by the courts of other countries, it is evident from the valuable judgment in the case of Ruding *vs.* Ruding that those of England (whilst they admit the universal authority of the *lex loci*, in determining the validity of marriages, pleaded to have been had according to law, and acknowledge the validity of marriage had in conformity to its regulations, without considering whether they are more strict or less cautious than our own) do not admit opposite propositions in an equal extent by laying down a positive rule that no marriage is valid that has not been had according to the law of the country of its celebration.

In support of what I have here stated, the Court deems it interesting to make the following citations from the decretals:—

" Ex parte C. mulieris nobis intimatum est quod Andreas " juramentum præstitit, quod eam ab eo tempore pro conjuge " temeret, et ei sicut uxori suæ fidem servaret, Ipsa quoque " eidem Andreæ juravit se illum pro marito habiturum, et fidem " tanquam viro proprio servaturam: quo facto prænominatus A. " reliquit eamdem. Quia igitur nèmini licet uxorem suam sine " manifestâ causâ fornicationis dimittere, et tunc eam sibi recon- " ciliare debet, aut ipsâ vivente continere; mandamus, quatenùs " eumdem ut superinductâ dimissâ, et ad uxorem suam rèdeat, " et eam maritali affectione pertractet, monitione præmissâ, per " eccles. cens. cogatis. *Eod. tit. cap.* 9, *Voy. aussi le chap. II.* " de præsumptionibus, *et le chap.* 6. de eo qui cognovit consan- " guineam, *etc.*

" Si matrimonia ità occultè contrahuntur, quod exindè legitima " probatio non appareat, ii qui ea contrahunt, ab ecclesiâ non " sunt aliquatenùs compellendi. Verùm si personæ contrahen- " tium hæc voluerint publicare, nisi rationabilis causa præpediat, " ab ecclesiâ recipienda sunt et comprobanda, tanquàm à princi- " pio in ecclesiæ conspectu contracta. *Ibid.* de clandestinâ " disponsatione, *cap.* 2.

" Veniens ad nos Gu. suâ nobis relatione monstravit, quod " in domo suâ mulierem quandam receperit, de quâ prolem " habuit, cui fidem coram pluribus præstitit, quod eam duceret " in uxorem. Interim autem cùm apud domum vicini sui per- " noctaverit, ejus filia nocte illâ secum concubuit, quos pater " puellœ simul in uno lecto inveniens, ipsum eam per verba de " præsenti desponsare coëgit. Ideoque mandamus, quatenùs si " inveneris quod primam post fidem præstitam cognoverit, ipsum " cum eâ facias remanere : alioquin secundœ (nisi metu coactus " qui posset in virum constantem cadere, eam desponsaverit) " adhærere faoias, ut uxori. *Ibid.* de sponsal. et matrim. *cap.* " 15.—Is quid fidem dedit M. mulieri super matrimonio contra- " hendo, carnali copulâ subsecutâ, si in facie ecclesiæ ducat " aliam et cognoscat, ad primam redire tenetur : quia licèt præ- " sumptum primum matrimonium videatur, contra præsumptionem " tamen hujusmodi non est probatio admittenda. Ex quo sequitur, " quod nec verum nec aliquod censetur matrimonium quod de " facto est postmodo subsecutum. *Eod. tit. cap.* 30."

In conclusion, I quote the opinion of M. Agier, in his Treatise on Marriage, vol. I., pp. 122 and 123 :

" Le concile de Trente, pour faire cesser l'inconvenient de la " clandestinité, a ordonné que les mariages ne seraient contrac- " tés valablement qu'en présence du propre curé. Mais, sans " examiner pour l'instant si le concile en ce point n'a pas excédé " son pouvoir, j'observe d'abord qu'à cet égard il introduisait un " droit nouveau ; et en conséquence le décret porte qu'il ne " sera exécuté dans chaque paroisse que *trente jours après sa* " *publication*. Ainsi, jusqu'à ce moment, et dans toutes les " paroisses où il n'avait pas encore été publié, les mariages ont " pu se contracter valablement comme autrefois, sans l'interven- " tion d'aucun prêtre.

" J'observe ensuite que le décret du concile de Trente est " subordonné, comme toutes les lois humaines, à la loi supérieure " de la nécessité ; d'où il suit que son exécution cesse dans les " endroits où il ne se rencontre pas de pasteur en exercice, " ni personne qui en tienne la place ; c'est la décision uniforme " des canonistes."

It may be well to remember that, in 1803, at Rivière aux Rats there were no priests, no ministers, nor is it proved that there were any magistrates at that place, or in the neighbourhood. It was a barbarous country situate in the remote wildernesses of North Western America ; religion had not as yet proclaimed her authority ; had not inculcated her teachings, nor extended her sanctions to the domestic life of the inhabitants. Christianity had

not built her temples, nor had the ecclesiastical power sent forth decrees for the guidance either of the European, or the native. Civilization had made no serious impression; had exerted no salutary influence over those wild regions and those wilder nations of the forest. Associating with Indian warriors, hunters and fishermen, and trading, bartering in trinkets, muskets, rum and peltries, the servants and clerks of the North West Company, it is easy to suppose, were not very successful in inculcating morality among the natives, or in maintaining their own; it can, without difficulty, be imagined that the intercourse and traffic between these men and the savages, were not likely to form a very religious or refined community. The restraints of law, or the sanctions of religion so far as they recognized either, it may be presumed were not extremely effective in controlling such a mixture of barbarism and peculiar civilization as prevailed in the Athabaska country in 1803, and previous to that time. At such a place, surrounded by such influences and such unfavorable circumstances, if Mr. Connolly, whose moral character seems to have been without reproach, desired, whether from feeling or interested motives, to take this Indian maiden to his home, he had one of three courses to pursue; that was, to marry her according to the customs and usages of the Cree Indians—to travel with her between three and four thousand miles in canoes and on foot, to get married by a priest or a magistrate—or to make her his concubine. I think the evidence in this case will clearly show which of these three courses he did adopt, and which of them, during a period of twenty eight years, he honorably and religiously followed. The first enquiry to be made then, is, whether in 1803, at Rat River, in the Athabaska territory, there existed among the Cree Indians there and in the neighbourhood, any native usage, law or custom relative to marriage among the Indians themselves, and also in regard to the European traders and the Indian women; if so, whether that custom has been proved and what is the nature of it. Before proceeding to examine the evidence of record, and upon which the decision of the Court must of course mainly rest, I may appropriately advert to historical testimony, establishing the existence generally of such a law or custom among the natives; and as there was a striking similarity in forms, ceremonies and usages of marriage among all the tribes and nations of North American Indians, (with the exception of some Mexican tribes) from the Gulf of Mexico to Anticosti and the frozen Ocean, it will be apparent that the law of the Crees was not exceptional, but entirely in harmony with, and conformable to the general usages of the barbarians over the entire continent of North America.

Washington Irving, in his Astoria, says, in reference to this usage: "The suitor repairs not to the bower of his mistress, "but to her father's lodge, and throws down a present at his "feet. His wishes are then disclosed by some discreet friend "employed by him for the purpose. If the suitor and his "present find favor in the eye of the father, he breaks the "matter to his daughter, and inquires into the state of her "inclinations. Should her answer be favorable, the suit is "accepted, and the lover has to make further presents to the "father—of horses, canoes, and other valuables, according to "the beauty and merits of the bride; looking forward to a "return in kind whenever they shall go to housekeeping."—(Cap. 56, p. 462.)

Hildreth, in his History of the United States, says (Cap. 2. p. 62): "Marriage was a sort of purchase—the father receiving "presents from the husband in exchange for his daughter, who, "after a few months of fondling and favor, fell to the condition of "a domestic servant. Polygamy was not common, except among "the chiefs; but there were no objections to it. Every Indian "had as many wives as he could pay for and support. It was, "indeed, the labor of their wives that enabled the chiefs to "maintain the hospitality proper to their station. The Indian "husband divorced his wife at pleasure. In case she proved "unfaithful, he might put her to death. Unmarried women "might follow, with little reserve, the bent of their inclinations; "but the Indians of both sexes, as a general rule, were remarkable for continence. The affection of the women for their "children was unbounded; the fathers also were very indulgent."

Bell, in his Statistical and Philosophical Geography of North America, says: "None of the North American tribes, however "rude, are unacquainted with the institution of marriage. They "generally are contented with one wife; sometimes they take "two, but seldom more than three. The women are under the "direction of their fathers in the choice of husbands, and very "seldom express a predilection for any particular person. Their "courtship is short and simple. The lover makes a present, "generally of game, to the head of the family to which the "woman he fancies belongs. Her guardian's approbation "obtained, he next makes a present to the woman; and her "acceptance of this signifies her consent. The contract is "immediately made, and the match concluded. All this is "transacted without ceremony—without even a feast. The "husband generally carries his wife among his own relations,

" where he either returns to the tent that he formally inhabited, " or constructs a new one for their own use. They sometimes, " but seldom, remain among the wife's relations. These con- " tracts are binding no longer than during the will of both " parties. If they do not agree, the woman returns to her " relations, and if they have any children, she takes them along " with her; but after they have children, a separation very " seldom takes place. If a woman be guilty of adultery, and " her husband be unwilling to divorce her, he cuts off her hair, " which is considered the highest disgrace in which can be put " upon a female."—(Vol. 5, cap. 2, p. 274.)

Bancroft, in his History of the United States, says (Vol. III., cap. 22, page 266): " And yet no nation has ever been found " without some practical confession of the duty of self-denial. " God hath planted in the hearts of the wildest of the sons of " men a high and honorable esteem of the marriage bed, " insomuch that they universally submit unto it, and hold its " violation abominable. Neither might marriages be contracted " between kindred of near degree; the Iroquois might choose a " wife of the same tribe with himself, but not of the same cabin; " the Algonquin must look beyond those who used the same " *totem*, or family symbol; the Cherokee would marry at once a " mother and daughter, but would never marry his own imme- " diate kindred.

" On forming an engagement, the bridegroom, or, if he were " poor, his friends and neighbours, made a present to the bride's " father, of whom no dowry was expected. The acceptance of " the presents perfected the contract; the wife was purchased; " and, for a season at least, the husband, surrendering his gains " as a hunter to her family, had a home in her father's lodge.

" But, even in marriage, the Indian abhorred constraint; and, " from Florida to the St. Lawrence, polygamy was permitted, " though at the north it was not common. In a happy union, " affection was fostered and preserved; and the wilderness " could show wigwams where 'couples had lived together thirty " 'and forty years.' Yet love did not always light his happiest " torch at the nuptials of the children of nature, and marriage " among the forests had its sorrows and its crimes. The infideli- " ties of the husband sometimes drove the helpless wife to suicide; " the faithless wife had no protector; her husband insulted or " disfigured her at will; and death for adultery was unrevenged. " Divorce, also, was permitted even for occasions beside adultery; " it took place without formality, by a simple separation or " desertion, and, when there was no offspring, was of easy occur-

" rence. Children were the strongest bond; for, if the mother " was discarded, it was the unwritten law of the red man, that " she should herself retain those whom she had borne or nursed." (Vol. III., cap. 22, p. 226.) (See Catlin's Letters on the North American Indians, vol. I., Letter 26, p. 213.)

It would be easy to multiply historical authorities on this point, both from English, American, and French historians. They are unanimous, and all go to establish this Indian custom of marriage and its incidents; and among these incidents, divorce at will is, no doubt, clearly shown. How far this right of divorce at will affects the present case, will be seen in the sequel of these observations.

But we have other evidence of this custom; the Court has proof before it, which I am bound to regard as conclusive, and that is, the clear and concurring testimony of witnesses, produced by both parties, and placed on record in this cause.

The first witness to whose evidence I shall refer, is that of Amable Dupras. In answer to the question as to the custom of the Cree country, he says: " La façon de ces pays est que " lorsqu'on avait envie d'avoir une femme, *on allait demander* " *au père s'il voulait nous la donner, et si le père voulait* " *donner sa fille, on allait leur acheter quelque chose par recon-* " *naissance. Ordinairement, c'était la façon du pays de* " *donner un présent au père de la fille donnée en mariage.* " Ce n'était pas loisible d'avoir plus d'une femme. *Un homme* " *qui était marié, comme cela était regardé, comme étant bien* " *marié et le mariage était regardé comme les mariages d'ici;* " *et dans le mariage, des noces se faisaient comme dans le* " *mariage et les noces d'ici.* Des Canadiens se mariaient et " faisaient des noces là comme ailleurs. *C'était impossible de* " *se marier autrement*, parcequ'il n'y avait pas de prêtres ni " ministres dans le pays à ce temps-la, les femmes conservaient " beaucoup d'autres nations. J'ai souvent vu faire des mariages " dans ce pays, et je parle de cette coutume avec connaissance. " J'ai été souvent moi-même à des noces." This witness seems to be a man of considerable intelligence. He is seventy-two years of age, and in earlier life had been fourteen years in the North-West territory. He knew five or six nations; and says that, in regard to marriage, this was the general custom.

This testimony is, moreover, corroborated by that of a man of the name of Noel Annance, produced on the part of the Plaintiff. His evidence is somewhat remarkable, and is to the following effect:—" *The Indian customs do not differ much with regard* " *to marriages.* The custom of polygamy prevails universally

" among the Indians, particularly with the chiefs, in consequence " of their ability to support a number of wives; I do not say that " I have ever known of any persons being murdered in conse- " quence of a regular intercourse between the sexes. I have " myself seen them greatly ridiculed, and have heard the women " talk especially. When a man and a women live together, they " are called man and wife. I could not say that I ever knew of " any distinction being made in the Indian territory or North- " West in regard to any man and woman who live together. " The woman is always called the wife of the man with whom " she lives, *without regard to the manner of marriage. It is* " *always presumed that she has been regularly bought.* When " I say that a man cannot legally have two wives in the North- " West or Hudson Bay territory, I do not mean that the Indian " law prohibits it, but that the law of the civilized people—that " is, the Hudson Bay Company's servants—are against it. It is " only sometimes that the subject of giving away a girl is " mentioned to the chief, and that purely out of deference to " him. The term squaw, signifies a woman or wife; a young " woman is called *hunk* squaw. A woman who lives with a man " is called that man's squaw, which, in fact, means a wife. If I " had a squaw or wife in the Hudson Bay territory, she would " be called Annance's squaw—meaning my squaw or wife. " There was a chief at Faaser River, whom I knew well, who " had ten squaws or wives. His Indian name was Sascatan."

The Rev. Pierre Aubert, Père Oblat, testifies as follows: " Si " elle n'était pas chrétienne lors de son union avec William " Connolly, il faudrait une dispense *selon la règle générale des* " *lois ecclésiastiques.*" But he says that, according to the custom of the country, " *l'époux offrait des présents, quand les* " *présents étaient acceptés les parents donnaient en marriage* " *leur fille à l'époux qui la prenait alors pour femme.*" This gentleman was several years in the Hudson Bay territory, and his attention had been much directed to the customs of the country in regard to marriage. He adds: " Les prêtres ne sont allés " jusqu'à l'Isle de la Crosse s'y établir, qu'en l'année 1843. " Avant ce temps-là, il n'y avait pas de registres dans ce payslà."

Another witness of great experience and intelligence, Pierre Marois, thus deposes: " Un homme par là ne pouvait pas prendre " plus qu'une femme, et nous regardions cette union comme " l'union de mari et femme par ici, et union aussi sacrée. J'ai " été marié là moi-même à la façon du pays. J'ai vécu vingt- " trois ans avec elle, et elle est morte il y a huit ans passés. " *Quand on voulait se marier dans le Nord Ouest, il fallait de-*

" *mander au père et à la mère la fille qu'on voulait avoir, et s'ils* " *consentaient, on demandait après au bourgeois la permission* " *de se marier, et c'était là toute la cérémonie ; et après cela,* " *nous nous considérions comme mari et femme légitimes comme* " *ici, comme si nous étions mariés à l'église.*"

This evidence is strongly, entirely corroborated by Alexander Robertson and Mr Herriott, both men of education and long and varied experience in the North West regions.

Mr Robertson was in the employ of the Hudson's Bay Company ; he entered the service in 1812, and remained in the North West thirty-six years. He says there was but one form of marriage in the North West, and that was the giving away. He saw his men get wives in the way he mentions, that is, from their relatives ; they gave presents if they pleased ; he considered this a marriage according to the customs of the country.

Mr Herriott says : " In 1809 I went up to the Hudson's Bay " territory. I went in the employ of the Company. I have " risen from apprentice clerk to that of chief factor, from the " lowest grade of clerks to the highest position in the Company's " employ, except that of governor. I lived in that country up " to September, 1864, constantly. I have met the late William " Connolly there at Stewart's Lake, in the years 1828 and 1829. " This was the first time I met him, he was married then. I " think his wife was a pure Indian of the Cree Tribe. He had " three or four children."—" *When I say married, I mean ac-* " *cording to the custom of the country, which was by an agree-* " *ment between the father of the girl, and the person who was* " *going to take the girl to wife. They lived as married people* " *when married in this manner. I considered it as binding as if* " *celebrated by an Arch-bishop.* I was married after the custom " of the country myself. The first clergymen that I saw in " that country was in 1838, their names were Blanchet and " Damase, they passed me at Edmonton on the Saskatchewan. " These were the first priests I saw since the year 1809 in that " that country. Rebaska is from six to seven hundred miles " north from the Saskatchewan. The first clergymen that " went up the English River went up some time in the forties. " I was never there myself. None could have gone there " without my knowledge. There was no Courts of Justice " in the North West, except at the Red River Settlement, and " that at a comparatively late date. We followed the English " Law ; it was not customary for the Europeans to take more " than one wife ; it was not customary for the Europeans to take " one wife and discard her, and then take another. *The marriage*

" *according to the custom above described was considered a* " *marriage for life.* I considered it so. I know hundreds of " people living and dying with the woman they took in that way " and without any other formalities. According to my opinion " this marriage lasted during the lifetime of the parties in as " binding a manner as if married by a clergyman. The first " missionary that I ever heard of coming was to the Red River " Settlement, far to the South of us, was in the year 1819 or " 1820, I will not be sure as to the date, it may have been 1816. " I never heard of any Jesuit Missionaries, nor of any Roman " Catholic Missionaries having resided at any of the Company's " posts previous to 1840. These last missionaries came to the " Saskatchewan and to the English River. I never heard of, or " have met anybody in the North West territory who had been " married by a priest or clergyman in the North West territory " previous to eighteen hundred. There were no Jesuits in that " country when I went there. I resided nearly eleven years at " the Red River Settlement. I knew all the European settlers " there until the last four years. I never met any person living " at Red River Settlement who was married in the North West " territory by a clergyman resident in the North West territory " previous to eighteen hundred. I have never seen or heard of " any person being married at York Factory or Norway House, " or at any post on the Saskatchewan, by a resident clergyman, " previous to the year 1817. I know of instances of persons " married after the custom I have described bringing their wives " into civilized countries and re-marrying them according to the " forms of civilization; but I know of no instance where they " have been so brought into civilization without going through " that form. I know that William Connolly brought his wife " down to Canada. There is no rule amongst the natives by " which a wife is entitled to property by virtue of her marriage. " When a man dies, his family, wife and children inherit whatever " he leaves. Had I come to a civilized community, I believe I " should have married according to the civilized forms of " solemnizing marriage. I should have done so to please people " and to conform to the customs of society."

Joseph Larocque, a witness for the defence, in answer to a question in cross-examination, by which he was asked, " How did " a chief clerk, partner, or bourgeois take an Indian wife in the " North-West country ?" says, " *He took her by the consent of* " *her parents and relations; there was no other ceremony except* " *the giving of a few presents.* The man then lived with her as " long as he liked or she liked." He adds " that he does not

" think any of these marriages were legal, because there were no " priests or ministers there."

The Court has examined with great care the cross-examination of these witnesses, and also the evidence adduced by the defendant on this point, but has found nothing to contradict or, in the slightest degree, to invalidate this testimony. It stands unimpeached, and, in my opinion, is unimpeachable. This law or custom of the Indian nations is not found recorded in the solemn pages of human commentaries, but it is written in the great volume of nature as one of the social necessities—one of the moral obligations of our race—through all time and under all circumstances, binding, essential, and inevitable; and without which neither man, not even barbarism itself, could exist upon earth. It is, I think, conclusively established in this case, by the evidence of intelligent and experienced men, as being an existing and immemorial usage observed and consecrated in one of the most sacred and delicate relations of human life, even among the barbarians of North America. As such, with all its imperfections in a religious view of the holy sacrament and sanctities of marriage, it is entitled to the respectful consideration of this Court. It exacts the solemn consent of parents, and that of the parties who choose each other, for good or for evil, as husband and wife —it recognizes the tie and some of the sacred obligations of married life; and it would be mere cant and hypocrisy; it would be sheer legal pedantry and pretention, for any man, or for any tribunal, to disregard this Indian custom of marriage, inspired and taught, as it must have been, by the law and the religion of nature among barbarians, who, in this essential element of a moral life, approach so near to the holy inculcations of Christianity. I apprehend that it is not much more loose or immoral than the well-known laws of Gretna-Green, which dispense with the consent of parents; a marriage according to this usage of the Crees would, in the opinion of the Court, be as solemn and as binding in the eye of the law, as many which the greatest English judges have declared valid. I shall have occasion to refer to this more particularly hereafter.

But the defendant contends that, even admitting the existence of this Indian law or custom, there is no legal or conclusive evidence in the record to show that William Connolly was ever married to the Cree woman according to this alleged usage. If this be true—if the testimony upon this point be illegal, be not conclusive—then there is an end of the plaintiff's case. I come, therefore, to the consideration of the proof which he has adduced of his father and mother's marriage; and this evidence, if admis-

sable and sufficient in law, results (1st) from a cohabitation of twenty-eight years, during which time they were reputed to be husband and wife—had the *status* of married persons, and were known and acknowledged as such by all the world; and (2nd) from Mr. Connolly's repeated and solemn declarations that he had married his Indian wife according to the usages and customs of her tribe or nation, and also from the statements of Mrs. Connolly herself, that she had been married in the manner described by William Connolly. I shall examine, in the first place, the proof of cohabitation and repute.

Mr. Alex. Robertson, witness for the Plaintiff, says:—

"I saw the late William Connolly for the first time in 1815 or "1816, at Cumberland House, in the North-West territory. He "was then in the employ of the North-West Company. I entered "the service of the Hudson Bay in 1812, and during my service "of thirty-six years I saw the said William Connolly very often "at different posts in the North-West territory, at which time "there were no priests or ministers there. I often saw Susanne "at his house at the different posts, and he introduced her to "me as Mrs. Connolly. She passed and was universally "acknowledged as his wife at the different posts where I met "her. She was called Mrs. Connolly, and her children by "William Connolly were always acknowledged in public as the "lawful issue of their marriage. There were plenty of white "people there connected with the Company, and they all lived "inside the fort, in the Company's houses, and I heard them "and their wives, white and Indian, and their servants, call "Susanne, Mrs William Connolly. The fact is, they were "acknowledged to be man and wife everywhere I met them. "Connolly made money in the Company, and brought down his "wife and family to Montreal, many years after I first saw them "in the North-west. She and her children first went to St. "Eustache, and then came to Montreal, where they boarded "with Madame Poulin, Connolly's sister. She was, when in "Montreal, called old Mrs. Connolly."

"I was intimately acquainted with said William Connolly in "the North West, and he never lived with any other woman "than *his wife*, said Suzanne. William Connolly and said Suz-"anne were living together as man and wife for about thirty "years to my knowledge."

John E. Harriot, witness for Plaintiff, says: "The Indian "woman that the late William Connolly was living with, was "regarded by all persons living in that country and by myself "as his wife. In speaking of her, the late William Connolly

" was accustomed to call her his wife, and treated her as his " wife."

Amable Dupras, témoin pour le Demandeur, dit: " A ce " temps-là, c'est-à-dire, vers 1818, et pendant tout le temps, j'ai " connu Monsieur Connolly et Madame Connolly. J'ai entendu " Monsieur Connolly me dire lui-même que c'était sa femme, et " elle était connu par tous les voyageurs comme la femme de " Monsieur Connolly.

" William Connolly et sa femme Suzanne ont vécu paisiblement " au vu et au sçu de toute leur famille prenant la qualité de " mari et femme, pendant le temps que je les ai connu."

Le dit Amable Dupras répond comme suit aux questions qui lui sont faites à ce sujet:—

Question.—Pendant quel laps de temps est-il à votre connaissance que M. Connolly et sa femme Suzanne ont vécu ensemble comme mari et femme, publiquement, au vu et sçu de leur famille et le public?—*Réponse*—Pendant cinq ans, c'est-à-dire pendant que je les ai connu.

Question.—Avez-vous entendu le feu William Connolly lui-même dire que la dite Suzanne était sa femme?—*Réponse*—*Oui, Monsieur.*

" Monsieur Connolly m'a dit que sa femme était la fille d'un " chef qu'il avait *mariée.*"

Noël Annance, witness for Plaintiff, says: " I then found at " Connolly's post at New Caledonia the family of said William " Connolly, consisting of his wife, *as he told me*, and some girls " and boys."

" I remained at New Caledonia, when Mr. and Mrs. Connolly " were living there, four or five days, and then returned to my post. " They were living there at that time as man and wife. This I " know from what I could see, and from what Mr. Connolly told " me. He told me several times that she was his wife, and the " mother of his children, and that he had been married to her " according to the custom of the country; that at that time he " was seventeen and she fifteen when they were married."

" I boarded at Pion's a week with Mrs. Connolly in Montreal. " She was then called Mrs. Connolly."

" I never knew or heard of any man and women living together " in the North West without being married."

Rév. François M. Turcotte, de St. Gabriel, dit: " Monsieur " Connolly m'a dit lui-même que la dite Suzanne était sa femme, *sa* " *propre femme.* Je l'ai interrogé sur l'usage de prendre plusieurs " femmes, et il m'a répondu qu'l respectait trop sa femme pour " se permettre de faire usage d'autres femmes."

Pierre Marois, témoin produit par le Demandeur, dit: " Je l'ai " toujours connu (Suzanne) pour la femme de feu William " Connolly et j'en ai jamais connu d'autres pour sa femme. J'ai " été quatre ans dans l'emploi de la compagnie du Nord Ouest, " et dix-sept ans dans la compagnie de la Baie d'Hudson. Pen- " dant tout ce temps là j'ai connu le feu William Connolly, et sa " femme, sauvagesse. J'ai hiverné quartre ans à Fort Cumberland. " Sa femme était avec lui là. Quand il nous disait de faire " quelque chose pour Madame Connolly, il nous disait: Allez donc " faire ceci ou cela pour *ma femme*. Il vivait avec sa femme " comme les autres bourgeois, et elle était connue par tout le " monde là comme Madame Connolly. C'est à ma connaissance " que Monsieur et Madame Connolly étaient mariés selon la " coutume du pays."

Judge Johnson, in his deposition, says: " I cannot tell how " long Mr. Connolly lived in the Hudson's Bay Territory. I " understand that Mr. Connolly lived with his Indian wife until " the year 1832. I never heard that Mr. Connolly had more " than one Indian wife, and always heard that he was a moral " and well conducted man."

Joseph Mazurette, ancien voyageur, dit: " La femme de " Monsieur Connolly était de la tribu des Crees. Je les ai connu " que pendant le cours de deux ans, c'était tout le temps que " j'étais là. Ils ont vécu là comme homme et femme quand je les " ai connu. Madame Connolly était connue entre tous les bour- " geois et entre tous les engagés comme la femme de Monsieur " Connolly

This is the principal evidence of the cohabitation of Mr. and Mrs. Connolly as husband and wife in the Indian country. The Indian woman throughout all the North West territories, at all the trading posts, and settlements there, was considered and treated both by natives and Europeans as his lawful wife, during a period of nearly thirty years; the children, moreover, were regarded as legitimate—Connolly acknowledged her as his wife —gave her his name, and bestowed it upon his offspring. It is really very difficult to conceive how, upon such facts proved beyond the possibility of doubt, this connection should be considered by any Christian or civilized Court, under the circumstances of this case, as concubinage, and the Indian woman as Mr. Connolly's concubine, branding the children who bore his name as illegitimate. But it may be, and it has been, said, that this is precisely the way they do things in the North West. That living with her publicly, treating her and acknowledging her as his wife in that country, amount to nothing; it is an understood thing,

a man takes a squaw, lives with her as long at it suits him, and then discards her as he would a mistress. It is true, he thereby bastardizes and makes outcasts of his children;—it is also true that when youth and beauty have faded, when the purity and dignity of innocence have been destroyed by the contamination of unlawful passion, the trader consigns his Indian wife and offspring to the contempt of the world, dismisses her and leaves her to pass the wretched remnant of her life in solitude and despair. That such is the custom of the country may or may not be the case; but the European settler cannot act after this fashion. Without contesting this view of the position, without discussing its reasonableness or morality, but admitting all that is contended for, there is something more in this case. Mr. Connolly did not restrict his conjugal intercourse with this Indian woman to the country where such extraordinary usages prevail; it was not only in the North West that he cohabited with her, and treated, and acknowledged her as his wife; but he brought her to Canada, and continued the same intercourse and treatment here; and in connection with this branch of the case, there is a fact of considerable importance, and one, which so far as it goes, has received the serious consideration of the Court, not only in regard to this question of repute and cohabitation, but also with reference to another point, which will require to be carefully examined and decided hereafter. The proof of the facts just adverted to, is in the opinion of the Court conclusive.

Henriette Routier, produced on the part of the Plaintiff, says: "Je demeurais avec mon père dans la paroisse de St. Eustache "en 1831. Le feu William Connolly venait dans le mois de "septembre 1831 à St. Eustache, avec sa femme, une sauvagesse "nommée Susanne, et leur famille au nombre de six, et tenait "maison vis-à-vis le magasin de mon père. L'aîné de ses enfants "est le Demandeur en cette cause, qui était alors fermier de M. "Smith, mon oncle, à St. Eustache. Le dit William Connolly "introduisait la dite sauvagesse Susanne à tous les voisins comme "sa femme, et l'appelait *Mrs. Connolly*. Elle recevait des "visites là, et ma mère y faisait visites. Ils ont restés là jusqu'à "l'année suivante, et quelques uns de leurs enfants ont été baptisés "à St. Eustache. Madame Connolly faisait des achats au "magasin de mon père, et M. William Connolly venait payer pour "elle. Le Demandeur pouvait avoir alors vingt neuf à trente ans. "Le prêtre qui a baptisé les enfants est M. Turcotte, et il venait "souvent faire visite dans la famille de M. William Connolly."

Mr. Turcotte, the priest, says: "J'ai connu William Connolly, "le père du Demandeur, dans l'année 1831. C'était à St.

" Eustache, à la Rivière du Chêne, dans le Bas-Canada. Mr. " Wil. Connolly est arrivé à St. Eustache avec sa famille en " l'automne de 1831. Sa famille était composée de Madame " Connolly et de plusieurs enfants, au nombre de huit ou dix. C'est " moi qui ait baptisé les enfants mentionnés dans les exhibits deux " et trois. *Je les ai baptisés comme enfants légitimes* de William " Connolly. Le nom de la femme de feu Wil. Connolly, était " Susanne, sauvagesse. *M. Wil. Connolly m'a dit lui-même,* " *que la dite Susanne était sa femme, sa propre femme.*"

The cross examination of these witnesses elicited nothing which materially, if at all, affects the force of their testimony, from which it is clear that Mr. and Mrs. Connolly lived together as husband and wife at St. Eustache, in Lower Canada; and other witnesses prove that he afterwards brought his wife and children to Montreal, where they remained some time boarding, first with Connolly's sister, and afterwards with a Madame Pion. But there is no satisfactory evidence to show that they lived together as married persons at Montreal.

Besides this, as has already been intimated, there is something more in this part of the case: in addition to the evidence of cohabitation and repute both in the Indian country and in Lower Canada, we have the express declarations of the late William Connolly himself, that he married Susanne according to the usages and customs of the country.

The Honourable Mr. Justice Aylwin, a witness produced by the defence, and intended no doubt to sustain effectually the pretensions of the Defendant, deposes "That his (Judge Aylwin's) " uncle Connolly told him that he was about thirteen years old in " the Indian country, and that it was difficult for him to control the " Indians in their trade with the whites; that he had to get a " woman whom he would have to buy from her father; that he " had got a chief who had great interest among the Indians, that " this man had sold the mother of the Plaintiff to the late William " Connolly; when Plaintiff was born, he, the father, was only " fourteen or fifteen years of age, and his Indian wife (sic) woman " was about twelve years of age:

" The late William Connolly's Indian wife (sic) woman, was " the daughter of a chief of what nation I do not know. The late " William Connolly said that he had bought the said woman, that " after the purchase he had difficulty with the father in his trade, " and upon the strength of it had been obliged to use violence to " the father. After treating him well he had become tractable."

It does not appear that Mr. Connolly told his nephew, Judge Aylwin, whether he had purchased the Cree woman as a slave, as

a concubine, or as a wife. But the Court will give his memory the benefit of the doubt; and as slavery did not exist in the North West, and as concubinage is illicit, and the purchasing a young woman for that purpose is infamous, the Court will assume that Mr. Connolly purchased the Cree maiden from the Indian Chief her father, intending to make her his wife according to the custom of the country, and not as a slave or concubine; and there is no difficulty in this presumption, seeing that he lived with her and acknowledged her as his wife, during a period of nearly thirty years after this purchase.

When Mr. Connolly was desirous of having his two daughters baptised at St. Eustache, in 1831, he went to the Rev. Mr. Turcotte, the priest of the parish, and requested him to perform that duty for him. Mr. Turcotte hesitated about baptising the young ladies as the legitimate offspring of William Connolly and the Indian woman. He says he had very serious doubts about the precise character of this connection; he asked a great number of questions in regard to the Indian custom of marriage, and whether he, Mr. Connolly, had married Mrs. Connolly according to that usage. From Mr. Turcotte's evidence, Connolly seems to have been very earnest and impressive; for the occasion was rather a serious one, and there could be no compromise, evasion or smoothing matters over, with the priest, who received the assurance from Mr. Connolly, that he had married Mrs. Connolly according to the Indian custom; that she was his lawful wife, and that he had always respected her too much to take another woman, and thereupon the priest baptised the children as the offspring of William Connolly and Susanne, a squaw. I shall refer to the latter part of his evidence hereafter.

The witness Annance says, Connolly told him "several times "that the Indian woman was his wife and the mother of his "children, and that he had been married to her according to the "custom of the country, that at the time of their marriage he was "seventeen and she was fifteen," and it is worthy of remark that if they were married in 1803, the evidence of record shows that Connolly stated his age correctly to Annance, and erroneously to Judge Aylwin; for he was then seventeen years of age, not fifteen as he told his nephew. The same statement in regard to his marriage was made to other witnesses; and he seemed always particularly desirous of impressing upon those he associated with, that the Indian woman was his wife. Whatever may be thought generally of evidence by the admission of parties, no objection to that description of proof can be urged in the present case; these admissions were repeatedly and solemnly made, and on one occasion

of great delicacy and interest to Mr. Connolly. This evidence is moreover conclusively corroborated by other testimony of record.

The cross-examination of these witnesses elicited nothing which materially, if at all, affects this testimony.

On the part of the Defendant no less than fourteen witnesses have been examined. Two of them, Marie Bourgeois and Marie Poulin, are nieces of the late Mrs. Connolly (Woolrich), and Judge Aylwin, who is her nephew. All these witnesses will have a share in Connolly's estate, provided the present heir dies without children. Another, Elizabeth Woolrich, is the second Mrs. Connolly's sister. Of course all these persons state with a peculiar emphasis that the Indian woman was Connolly's concubine; that all the offspring are illegitimate; and that the Indian family recognized Mrs. Connolly (Woolrich) as the lawful wife of their relative. This was natural, and was to be expected: but the tone of their evidence is somewhat remarkable, and in any view of it, is not very material, except that of Judge Aylwin, who has stated facts of great importance in this case, as has been seen already, and as will be seen hereafter.

Mrs. MacDougall says she knew Mr. Connolly and Julia Woolrich well—"her (Mrs. McD's) brother was a Northwester and "very intimate with Mr. Connolly; he and others blamed him for "bringing the Indian woman here at all, and pitied her. My "brother pitied the Indian woman because he brought her down."

She says the second Mrs. Connolly passed as Connolly's legitimate wife, and the children of the Indian woman as illegitimate. The evidence of Elizabeth Woolrich, the sister, who may hereafter share in the estate, (as she says), is very strong in language and in expression of opinion. If the Court were obliged to adopt her testimony, or if it regarded it even as of much importance, the case would be easily disposed of. It is quite natural that she should entertain very decided views in a case like the present. Her testimony, however, amounts to very little, in my opinion, and can have no material effect upon the case. The evidence of the other witnesses, with the exception of Mr. Hopkins, Mr. Boucher, and Mr. Larocque, is immaterial. I have already had occasion to refer to Larocque's deposition. He is the principal witness for the defence, and it is proper I should give the whole of his evidence. It is very pertinent, and exhibits a state of things in the North-West Territory in some respects remarkable. As he depicts it, there is great room for judicious and perhaps extensive reforms. He was examined at Ottawa City and says:

"I do not know the Plaintiff except by repute. I was well "acquainted with the late Julia Woolrich, but do not know the

"other parties in the cause. I was well acquainted with the "late William Connolly, the one who married Julia Woolrich. I "went up to the North-West with him in 1801. We both went "up as clerks in the North-West Company. I was in the service "of this Company until it was amalgamated with the Hudson's "Bay Company, and remained in the service of the latter "Company until 1830. I was partner in the North-West "Company, and shareholder in the Hudson's Bay Company. I "was present at the marriage of Julia Woolrich and William "Connolly. I was intimately acquainted with the squaw woman "that William Connolly brought down with him. *He was never "reputed to be married to this Indian woman*, but I do not "know that if he had not fallen in with Miss Woolrich that he "would not have married her. *He was fond of his children "and the Indian woman.* This Indian knew very well at the "time that he married Julia Woolrich. I had conversation with "the Indian woman about the marriage. *She laughed and "talked about it, and said that she, Julia Woolrich, had only "got her leavings.* She was a Cree woman I believe. I under- "stand and speak the language well. I had occasion to see her "often at this time, and had frequent conversations with her "about William Connolly's marriage with Julia Woolrich. *She "did not seem to care much about it.* She lodged at that time "at Pion's, in Montreal. I was not much surprised at her not "caring. She had some hopes that Connolly would have married "her; and I think if he had not fallen in with Julia Woolrich "that he would have married her. *But she seemed not surprised "at his marrying a white woman.* But among other things she "said 'he will regret it bye and bye.' It was very common to "change women in the Indian country. The French Canadians "in the North-West Company's employ and the English did it "too."

"This practice was common amongst the natives also. There "was no ceremony in those days about taking a woman or leaving "her either. The women themselves did not care about it. "They did not care for their husbands, but they were very fond "of their children.

"I saw Connolly in the interim a few times, and heard of him "often enough. According to reputation he was not married. "*That is, he was married according to the custom of the country "there*,—that is taking a woman and sending her off when he "pleased. When I say the custom of the country, I mean that "the people did that as a common practice in those days. There "was not a legal binding marriage, there could not be in those "days.

"Some of the servants of the company brought wives or women "with them to Canada and married them there according to the "legal forms of Canada. On the contrary, some lived with "women in the interior and did not marry them, and abandoned "them; and others lived with them, and abandoned them to "marry white women in the civilized world. One McIntosh, I "believe, but I am not sure, that he remarried when he came "with her to Canada.

"John McGilvray lived with an Indian woman in the interior, "but he did not marry her. He married a Scotch woman, I do "not know where.

"Allan McDonnell brought his Indian wife down with him to "Canada, and, I think, got married to her. I knew old Hughes "and his Indian wife who came to Canada. *I do not think he "remarried when he came to Canada.* They lived together in "Canada for some time. I believe there are other instances, "but I do not recollect them at present. There were but few "of the servants of the Company who did not take women when "in the interior and live with them. But there were very few "who brought them into civilized society and married them. "The Cree Indians, like all the rest of the tribes, were wild and "savage, but not more so than the other tribes.

"*At the time I conversed with the Indian woman in question "she admitted that she was not married to Mr. Connolly.* It "was from her that I understood that she had hoped that he "would marry her, *on account of his children, of whom he was "very fond.* I recollect one John George McIntosh, who had "several women in the Indian country, all fine girls, most of "them half-breeds. He changed from one to the other, and had "children by most of them. He afterwards married a Scotch "woman. Sir George Simpson had plenty of women everywhere "in the interior, whom he lived with when he went to the "different places where they lived. The practice was so very "common that it was not thought strange. It was about the "time of Mr. Connolly's marriage with Julia Woolrich that I "had frequent conversations with his squaw."

CROSS-EXAMINED:

Question.—Was Wm. Connolly married to the Indian woman referred to according to the customs of the country? *Answer:—He took a woman according to the custom of the country. You may call it marriage if you please. It was the only kind of marriage that could be there,—that is, take a woman when you please and leave her when you please.*

Question.—What do you mean by a legal marriage? *Answer.*—I mean by a priest or a minister. There were no priests or ministers in the North-West country, where Mr. Connolly resided, when he took this Indian woman. *He could not be married in any other way than he was, except that he might have married before witnesses.* I cannot say when ministers or clergymen came to the Red River. I do not know anything about it.

Question.—How long did Mr. Connolly live with his Indian wife? *Answer.—He took her when he first went up to Rat River, about* 1803, *and kept her always until he went down to Montreal.* He had a good many children by her. He lived with her over twenty years. I never heard that he lived with any other woman, although he might have. The marriage of William Connolly to Julia Woolrich *was not over pleasing to the Indian woman. She might have scolded about it. She did scold a good deal about it, and she felt annoyed, and said he would regret it.* The Cree women were true to their fancy through fear.

Question.—Were the Cree women, married as this Indian woman was to Mr. Connolly, generally true to their husbands?—*Answer*—They were so when they were fond of them, and when they were not fond of them they were not.

Question.—What year did you have conversations with Mr. Connolly's Indian wife, about his marriage to Julia Woolrich?—*Answer*—About the time they were married, I do not recollect the year.

I never saw Mr. Connolly visit the Indian woman at Pion's, he might have done so but I do not know.

Question.—When you refer to its being common to change women in the Indian country, was not this practice confined to the "voyageurs" and understrappers of the Company?—*Answer*—Yes, generally so.

Question.—How did a chief clerk, factor, partner or bourgeois, take an Indian wife in the North West country?—*Answer*—He took her by the consent of her parents and relations. There was no other ceremony than the giving of a few presents. The man then lived with her as long as he or she liked.

Question.—When did you travel with Mr. Connolly or see him in the interior?—*Answer*—I cannot say what years, but I saw him at various times, and travelled with him for weeks in canoes. There could not be any legal marriage by priest or clergyman in those days in the interior, because there was no priest or clergyman there. I cannot say positively that Mr. McIntosh remarried his Indian wife, as I don't know anything at all about it. I do

not know whether John McGilvray brought his Indian wife to Canada or not. I don't know that John McGilvray married a Scotch woman; I only heard so, that is I heard that he married Miss McDonald, a daughter of Miles McDonald in Upper Canada. I do not know whether Allan McDonald remarried his Indian wife after he came to Canada with her, or not, but I think he did. The case of Hughes is the only one amongst gentlemen, I remember, who lived with his Indian wife in Canada without remarrying her according to the form practised in Canada.

Question.—Were you a partner in the North West and Hudson's Bay Companies?—*Answer*—I had shares in both Companies, I was a partner in the North West Co., and also a shareholder in the Hudson's Bay Co.

Question.—When Mr. Connolly's Indian wife admitted to you that she was not married to Mr. Connolly, did she not mean according to the custom of Canada, that is to say by a priest or clergyman?—*Answer*—Yes, I believe so, there was neither priest nor clergyman there. That question she could not answer, because she did not know anything about it. In a legal sense she did not understand what marriage meant, she expected that Mr. Connolly *might have kept her as they do in the Indian country.* She had always been living with him up to that time as far as I know.

Question.—Mention how long John George McTavish lived with one of the girls referred to and where?—*Answer*—He took Yacko Tinneys, she was a half-breed in the Rocky Mountains Spokane House, and lived with her about nine months. After which he took a daughter of McKenzie, on the Columbia River somewhere, he remained with her about the same time. I saw him afterwards in Montreal with a Scotch woman I heard he was married to. Sir George Simpson found women provided for him by pimps at the posts as he went along, he would keep them for some time and then give them to some clerk and promote him. The late William Connolly must have had by his Indian woman, six or more children. *Mr. Connolly never had but one Indian wife to my knowledge.* A common man could not take a woman without the permission of the Company.

Question.—Did you ever hear the Indian woman called Mrs. Connolly?—*Answer*—Yes, I heard her called so by all the engaged men of the Company, they did so out of politeness. Any clerk having a woman the men called her Madame. *I never heard of any of the men keeping two women at a time, it was not customary. A man could only have one wife at a time.* The husband was obliged to clothe her, and as to living, she was obliged to live on the fare of the country, fish or flesh. I never

heard that the Indian woman lived with any body else but Wm. Connolly, and do not think that she did."

As before stated, the Court has considered it right to give the whole of this man's deposition, in the first place, because his testimony is very peculiar, and because he is the principal witness for the Defendant, in regard to the state of society in the North West. There are some incoherencies and many contradictions in his evidence. In one place he says Susanne did not seem to feel the repudiation and second marriage very much, and afterwards, he says, she scolded very much and was annoyed about it. The account given of the morals of the traders clearly proves that great licence and disorder prevail in those countries. The Court will not and cannot believe the picture here given to be true. But if it were intended to show how little law or morality is to be found in the Hudson's Bay country; how impossible it was for men to consider themselves under the moral restraints of marriage, in a country where debauchery and lawlessness were so prevalent, there can be no doubt that object has been successfully attained; but perhaps it is to be regretted that some portions of this evidence should have been introduced into the record.

It is worthy of remark, however, that Mr. Connolly did not belong to the class of persons more particularly referred to here. He was free from the vices and licentiousness of those who surrounded him; and it was creditable to him and his Indian wife that in a country, such as that described by the witness Larocque, their conjugal relations were marked by fidelity and devotion to the duties which that relation imposes.

Upon the strength of all this evidence, it was strenuously contended by Mr. Stephens that the Court had proof of the Indian custom, and what that custom was; that we had cohabitation and repute during twenty eight years, and the birth and bringing up of a numerous family; that this repute and cohabitation, and the paternal care and education of the children, were known and conspicuous not only in the North West Country, but also in Lower Canada. That there was, moreover, Connolly's express declaration that he had married this woman according to the native and Indian custom or usage, and his deliberate statement that she was his lawful wife, and that as such, he respected her too much to take another woman. The learned Counsel then proceeded to show, with great cogency of argument and the citation of numerous authorities, that all this testimony combined was full and conclusive proof of the marriage of the Plaintiff's parents; that it was sufficient, even under the common law of England, and that it was legal, complete, and unanswerable, in this case.

The Defendant, however, has recorded her objections to all this evidence; and it was contended at the argument, that this attempt to prove a marriage by oral testimony was contrary to law, and directly against the provisions of our statute. (Chapter 20, Con. Statutes of Lower Canada.)

This Act does not apply to marriages solemnized without and beyond the limits of this Province. It could have no application whatever to such marriages, and there is no rule of evidence better known, longer recognized and more enforced than this; "That where there are no registers kept, no public records of marriages in existence, a marriage may be proved by parole testimony; by witnesses who were present, or by the declarations of the parents." It is also held that where registers have been lost or destroyed by fire, war, or other causes, parole testimony of marriage will be admitted. Lord Stowell and the best text writers have repeatedly stated the law to be as stated by the Plaintiff's Counsel, and as a matter of fact and constant and universal practice, such is undeniably the law. It is too elementary to be disputed—too well known to require the citation of authorities to support it, though some will be mentioned hereafter, in order that even upon this point there may be no doubt or misapprehension.

But admitting its legality, the main difficulty consists in this: does all this testimony amount to proof of a marriage which this Court is bound to recognize as valid? This brings me to the consideration of the law which defines what marriage is, and what testimony will constitute proof of its existence. It will be borne in mind that at *Rivière aux Rats*, in 1803, there were no priests, no ministers, no magistrates, no registers; that the decrees of the Council of Trent had not been promulgated there; that neither the ordinances nor the declarations of the French kings, nor the English marriage acts were in force in that distant and barbarous region; that if, besides and in addition to the Indian usage or custom, any European law obtained there, that law was the common law of England; that there has been adduced and placed of record in this cause, indisputable evidence that Mr. and Mrs. Connolly cohabited as husband and wife during a period of twenty-eight years; that the Plaintiff was born of that union, and that William Connolly, by repeated and solemn declarations, stated and admitted, that the Indian woman was his lawful wife. To this may be added the fact, also proved and of record, that this woman declared to several witnesses, that she had been married to Connolly according to the law and custom of her nation.

Before the citation of authority it may be proper to refer to the testimony of two Reverend Gentlemen, Mr. Turcotte and

Mr. Aubert, Priests of the Roman Catholic Church, witnesses for the Plaintiff, and the Rev. Mr. Boucher also a Priest of the same Church, examined on behalf of the Defendant. It is unnecessary to say that the Court could not in a matter of this kind be governed by their opinions, yet their evidence is a part of the record and it is not without importance.

Mr. Aubert says, in cross-examination :

Quand je dis qu'on savait que la dite Susanne avait été mariée au dit William Connolly, je le sais d'abord par l'opinion publique, et parce qu'elle même me l'a dit, et qu'elle me l'a dit en me racontant le fait.

Question.—Quelle sorte de mariage est-ce ?—*Réponse*—Celui qui était en usage alors pour tout le monde.

Question.—Est-ce un mariage ou reconnu par l'église ou par les lois civiles en aucun cas que vous pouvez rapporter ?—*Réponse* —Pour la légitimité du mariage on le considère comme valide, dès qu'on se conforme aux usages admis dans le pays où l'on se marie. Je n'ai pas eu occasion d'examiner cette question sous le rapport civil.

Question.—Savez-vous que bien souvent les chefs ont plusieurs femmes ?—*Réponse*—Pour les chefs natifs nés Sauvages, c'est vrai, mais pour les blancs, je n'ai jamais connu de bourgeois de la compagnie en avoir plus qu'une.

Question.—En cas qu'un chef natif se transportât dans un pays civilisé, et ayant quatre ou cinq femmes Sauvages prises suivant l'usage du pays sauvage, est-ce que toutes ces femmes seront légitimes, soit aux yeux de l'église ou de la loi ?—*Réponse* —La première seule sera légitime, et toutes les autres ne seront pas considérées comme des femmes légitimes.

Question.—Par quelle loi ou règle écrite ou comment autrement établie, sera faite une telle distinction entre les femmes d'un chef Sauvage, pour légitimer l'une d'entr'elles, et rejeter les autres ?—*Réponse*—Selon les lois ecclésiastiques ; elles se trouvent dans le droit *canon ;* pour les lois civiles je n'en sais rien.

Question.—Pouvez-vous citer une loi ou le texte de loi dans le droit *canon* à l'appui de ce que vous dites ?—*Réponse*—C'est dans le traité *du mariage.* Si j'avais su que vous me demandassiez le chapitre, j'aurais emporté le livre.

Question.—Savez-vous si le mariage, selon la coutume sauvage, porte des conséquences différentes, et met la femme dans une position très-différente, du cas d'un mariage dans un pays civilisé ? —*Réponse*—Ça ne dit rien ; ça dépend des mœurs, des usages, des pays, quant au traitement des femmes et aux droits.

Question.—Selon votre opinion, je demande si par les lois sauvages la dernière femme aura une préférence sur les autres. Est-ce que la règle sera renversée par le transport du domicile dans un pays civilisé?—*Réponse*—Si les Sauvages restent infidèles, l'église n'a pas à s'occuper de leur conduite; mais s'il veut rentrer dans l'église, l'église l'oblige à reprendre la première femme, parce qu'elle la considère comme la seule légitime, à moins qu'elle ne veuille pas se faire chrétienne.

Question.—Au cas qu'un homme et une femme se marient selon la coutume sauvage, s'ils veulent devenir chrétiens, est-ce qu'ils n'ont pas d'autres devoirs à faire; ou est-ce qu'ils doivent se faire remarier par un curé?—*Réponse*—Non, parce qu'ils sont déjà mariés.

Question. — Dans l'église catholique, n'est-ce pas que le mariage est un sacrement, et que c'est un devoir de recevoir la bénédiction nuptiale?—*Réponse*—Oui, le mariage est considéré comme un sacrement, mais la présence du curé comme témoin nécessaire est requis pour valider les mariages là où le décret du concile de Trente a été publié, *mais où il n'a pas été publié, les parties peuvent contracter mariage validement sans la présence du curé d'après les lois de l'église. Le seul fait que les époux se prennent dans l'intention de se marier est assez, sans l'imposition d'aucune cérémonie.*"

The Rev. Mr. Turcotte, after having spoken of the marriage of Mr. Connolly and Susanne, says in cross-examination:—

"D'après mon opinion ce mariage était valable selon les "règles de l'Eglise Catholique Romaine, c'est-à-dire qu'en "principe, c'est le *consentement mutuel qui fait le mariage.* "Si les parties sont des catholiques romains, l'église reconnaîtra "une telle union, *si le Concile de Trent n'était pas publié là.*"

The Rev. Mr. Boucher, a witness for the defence, was the confessor of the late William Connolly,—he had baptized one of his children by Julia Woolrich. He was an intimate friend of the second family. He had been for eight years a missionary at Red River, and knew the customs of that part of the country well. Speaking of polygamy among the natives, he knew of no case of a European having two women at a time. Concubinage is the prevailing vice in the North West; thinks Mr. Connolly was not married to Susanne, and when asked if he was not aware of the existence of such a marriage according to the custom of the country, he answers:—

"Je ne connais pas de coutume autorisant le dit mariage, ne "pouvant autoriser comme coutume ce qui est une action "défendue de Dieu et de l'Eglise. Je regarde comme crime "une liaison semblable."

He says that such a connection as that between Connolly and Susanne was concubinage—not marriage. This gentleman also states that the Plaintiff, and all Connolly's children by the Indian woman, passed for illegitimate. According to what is stated by these witnesses, though in some degree conflicting, I am inclined to think that if this marriage took place according to the usages of the natives, it would be regarded as valid by the Roman Catholic Church. I have referred to their testimony to show the opinion of Churchmen on this point. It will be remarked however that Mr. Boucher does not reason much upon the matter, but expresses simply his private opinion, and takes merely a moral or religious view of this kind of marriage.

Among the authorities cited by Mr. Stephens, one of the Plaintiff's Counsel, are the following:

"Le mariage, c'est l'union ou la société légitime de l'homme "et de la femme qui s'unissent pour perpétuer leur espèce."—Toullier, Vol. 1, No. 489.

"La loi ne considère le mariage que comme un contrat civil."—Toullier, No. 494, Vol. 1.

"By the law of nature, by the canon law, previous to the "Council of Trent and by the law of England as it stood "before the passage of the first marriage act.—(A. D. 1753), "and by the law of Scotland and France, nothing need be added "to this simple consent to constitute a perfect marriage."—Bishop on marriage, Vol. 1, page 219, Section 218; and see cases cited in notes.

"In most of the tribes, perhaps in all, the understanding is "that the husband may dissolve the contract at pleasure. It is "plain that among the savage tribes on this continent, marriage "is merely a natural contract, and that neither law, custom, or "religion, has affixed to it any conditions or limitations or forms, "other than what nature has itself prescribed."—Bishop on marriage, Vol. 1, No. 223.

"In a state of nature, says Lord Stowell, the contract of present "marriage alone, without form or ceremony superadded, consti-"tutes of itself complete marriage."—Lindo vs. Belisario, 1 Hagg. Con. 216, 230; 4 Eng. Ec. 367, 374; Bishop Vol. 1, No. 19.

"If practically a man and woman recognize each other as in "substance husband and wife, though they attempt to restrict "the operation of the law upon their relation, the law should "hold them—public policy requires this, the peace of the com-"munity requires it—the good order of society demands it—to "be married persons, unless some statute has rendered the "observance of some form of marriage necessary."—Bishop, Vol. 1, No. 227.

"Whenever marriage is governed by no statute, consent constitutes marriage, and that consent is shown by their living together." Bishop, Vol. 1, Nos. 229 and 230.

"But whenever the matter is not governed by any doctrine there to be mentioned, no particular form for expressing the consent is necessary, nothing more is needed than that in language which is mutually understood, or in any mode declaratory of intention, the parties accept of each other as husband and wife."—1 Fraser Dom Rel, 145; Bishop marriage, Vol. 1, No. 229;

"Quant aux enfants nés de ces mariages putatifs, ils sont légitimes à tous égards. Ils jouissent des mêmes droits que s'ils étaient nés d'un marriage, à la légitimité duquel il n'y aurait eu aucun obstacle."—Toullier, Vol. 1, No. 666.

"Marriage act of England does not apply to marriages abroad."—Lautour vs. Teesdale, 8 Taunton, 830.

"None of the English marriage acts extend to any marriages taking place out of England."—Blackstone, Vol. 2, page 296. Am. Ed. 1843.

"The laws which prescribe the manner in which and the persons between whom a marriage may take place, and under what circumstances, and in what manner it may be dissolved, constitute the status of husband and wife, and are therefore personal laws of universal effect. It is not necessary to resort to the origin of domicile, to ascertain what are its laws, if that were not the place in which the marriage was contracted. The law of the place in which the marriage was celebrated, must decide on its validity."—Burge Ed., 1838, Vol. 1, page 15.

"With respect to marriages contracted in a foreign country, they are considered as valid by our law, if made in such form as is deemed sufficient in the place where contracted."—Rex vs. Brampton, 10 East, 282; Lautour vs. Teesdale, 2 Marsh, 243; Doe vs. Vardill, 5 Barn and Cress, 438; 6 Bing N. C., 385; Dalrymple vs. Dalrymple, 2 Hagg, 52.

From these authorities, I think it is clear that by the Canon law, by the Common law of England, France and Scotland, the marriage under consideration with repute and co-habitation such as is proved, would have been held to be in all respects valid.

But the Defendant contends, admitting that among the Indians, this marriage would be good, yet it must be borne in mind that Connolly was a Christian, and Suzanne an infidel, and this is a sort of *empêchement*. That the custom or usage, contended for, is barbarous and pagan, it allows polygamy and divorce at will, and therefore, the principle which holds

that a marriage, good by the *lex loci*, is valid every where, does not apply—that no Christian Court of Justice can recognize and give validity to a marriage solemnized according to such a usage or custom, and consequently, upon the Plaintiff's own view of international law, I am bound to adjudge and declare this pretended marriage void. This is certainly a very strange pretention; and I confess my inability, after much research, to find any authority of sufficient weight to countenance such a proposition. Let us enquire now what is the law as laid down on this point, and ascertain if the decisions or the text writers of authority, so far as I have been able to examine them, have made such a distinction.

By what law is the validity of a marriage to be decided? "As to the constitution of the marriage, as it is merely a perso-"nal consensual contract, it must be valid everywhere, if cele-"brated according to the *lex loci*."—No. 110 Story Conflict of Laws, pages 203–205; No. 80 Story Conflict of Laws, Ed. '57, pages 110–218.

"Validity of marriage depends upon the *lex loci* of place of "solemnization."—Latour *vs.* Teesdale, 8 Taunton, 830. Lacon *vs.* Higgins, 3 Starkie, 178 and 183.

"The general principle certainly is, that between persons *sui* "*juris*, marriage is to be decided by the law of the place where "it is celebrated. If valid there, it is valid everywhere."—Story Conflict of Laws, Ed. '57, page 218, sec. 118; Id., pages 220–223. Dalrymple *vs.* Dalrymple, 2 Hagg Con. R., 54. Lacon *vs.* Higgins, 3 Starkie 183. Kent *vs.* Burgess, 11 Sim 361. Merlin Rep. Vo. Marriage, sec. 1, page 343. Pardessus, vol. 5, page 6, tit. 7, cap. 2, art. 1481 to 1495. Pothier, Marriage, No. 263; Catherwood *vs.* Caslon, 13 M. & W. 261, Connolly *vs.* Connolly, 7 Moore 438; Broom's Legal Maxims, Ed. of 1858, page 461; Boullenois Observ. 46, p. 458, &c., &c., &c.

"With respect to marriages contracted in a foreign country, "they are considered as valid by our law, if made in such form "as is deemed sufficient in the place where contracted."—Rex *vs.* Brampton, 10 East, 282. Latour *vs.* Teesdale, 2 Marsh, 243. Doe *vs.* Vardill, 5 Barn & Cress, 438.

"Ainsi les enfants qu'une femme sauvage aurait eus d'un "sauvage dans un pays où il n'y aurait point de lois établies, "seraient regardés comme légitimes, même parmi nous, quand "même le père et la mère n'auraient suivi d'autres lois que celles "qu'ils se seraient imposées; de même, ceux de deux époux, "Anglais ou Chinois, qui auraient accompli les lois de l'empire "de Chine ou du Royaume de l'Angleterre."—Merlin, Marriage, sec. 2, § 1.

Lord Stowell, in deciding on the validity of a marriage celebrated in Scotland, says, "that the only principle applicable to "such a case by the law of England is, that the validity of the "marriage rights must be tried by reference to the law of the "country where, if they exist at all, they had their origin. "Having furnished this principle, the law of England withdraws "altogether and leaves the legal question to the exclusive judg- "ment of the law of Scotland."—Dalrymple *vs.* Dalrymple, 2 Hagg. Cons. Reports, 59.

"It is, therefore," adds Lord Stowell, "to be advised, that "the safest course is always to be married according to the law "of the country, for then no question can be stirred; but if this "cannot be done on account of legal or religious difficulties, the "law of England does not say its subjects shall not marry "abroad."—Ruden *vs.* Smith, 2 Hagg. Cons. Reps., 371. And again, the case Grimshire *vs.* Grimshire.

The same high authority insists with great force upon the observance of this stringent and universal rule of the *jus gentium*. He says: "Why may not this Court then take notice of foreign laws, "there being nothing illegal in doing it? From the doctrine laid "down in our books—the practice of nations—and the mischief "and confusion that would arise to the subjects of every country "from a contrary doctrine, I may infer that it is the consent of "all nations, that it is the *jus gentium*, that the solemnities of "the different nations with respect to marriages should be "observed, and that contracts of this kind are to be determined "by the laws of the country where they are made. If that prin- "ciple is not to govern such cases, what is to be the rule where "one party is domiciled and the other not? The *jus gentium* is "the law of every country, and is obligatory on the subjects of "every country. Every country takes notice of it; and this "Court, observing that law in determining upon this case, can- "not be said to determine *English* rights by the laws of *France*, "but by the law of *England*, of which the *jus gentium* is part. "All nations allow marriage contracts; they are "*juris gen-* "*tium*," and the subjects of all nations are equally concerned in "them; and from the infinite mischief and confusion that must "necessarily arise to the subjects of all nations, with respect to "legitimacy, successions, and other rights, if the respective laws "of different countries were only to be observed, as to marriages "contracted by the subjects of those countries abroad; all "nations have consented, or must be presumed to consent, for "the common benefit and advantage, that such marriages should "be good or not, according to the laws of the country where they

"are made. It is of equal consequence to all that one rule in "these cases should be observed by all nations—that is, the law "where the contract is made. By observing this law, no incon- "venience can arise; but infinite mischief will ensue if it is not."

And here it may be proper that I should refer more particularly than I have heretofore done, to one noticible incident in these Indian marriages, and that is polygamy. It was contended that this imparts to this connection its infidel character, and render it unworthy of recognition as a legal marriage by this Court, and excludes it from the operation of the general rules so clearly enumerated and laid down in the authorities which I have just cited. But it is obvious, and must be conceded at once, that this is an incidental, not an essential element, in the law or custom of marriage known among these aboriginal tribes. It is an abuse, but not a condition of or an essential ingredient in these barbarian rites and obligations of matrimony. If proved at all in this case, it is manifestly established *as the exception, not the rule;* and in regard to marriages between Christians and the natives, *it is not proved to be the custom.* It may have occurred in the case of some profligate men possessed of great power and authority in the Indian country, but as a general rule it was not known or practiced even among the natives. Mr. Connolly was not among those who sanctioned or connived at such an abuse of those sacred obligations which bound him so long and with so much fidelity to his Indian wife. The fact is, I have nothing to do with polygamy in this case. It does not in any way come up for my consideration, except in so far as it is an infidel and unchristain abuse of a foreign law, occurring in isolated cases, and which I am not bound to adjudicate upon, and which it is no part of my duty to recognize or sanction in the slightest degree, or in any way whatever. And here I may remark that although polygamy was allowed among the Jews, as a general rule they were content with one wife. Diodorus also informs us the Egyptians were not restricted to any number of wives, but that every one married as many as he chose, with the exception of the priesthood, who were by law confined to one consort. It does not, however, appear that they generally took advantage of this privilege; and Herodotus affirms that throughout Egypt, it was customary to marry only one wife. It is easy to reconcile these statements, by supposing that Diodorus speaks of a law which permitted polygamy, and Herodotus of the usual custom of the people; and if the Egyptians were allowed to take more than one wife, we may conclude, from the numerous scenes illustrative of their domestic life, that it was an event of rare occurrence.

Polygamy is permitted to the Moslem, but it is neither reputable to have more than one wife nor to divorce her without very cogent reasons: and though no objection can be made when there is no family, it is required, even in this case, that her wishes, and those of her parents, should be consulted; and many marriage contracts stipulate that the wife shall have no partner in the harem.

And although this is law which Christianity expressly condemns, yet I do not think I can go so far as to say, that its existence among the Crees rendered Mr. Connolly's marriage with the Indian a nullity.

Further, Mr. Cross, the learned Counsel for the Defendant, with great force and plausibility, has argued that there are other radical defects in this alleged marriage which, in his opinion, precludes the Court from regarding this union as legal matrimony. It was contended by him that no formal contract of marriage, verbal or written, has been proved; that a custom which dispenses with this as a basis of marriage, which requires no witnesses, the intervention of no civil or religious authority, which is accompanied by no solemn or suitable ceremonies, exacts the observance of no religious rites or sanctions whatever, and is a mere question of consent alone, is no marriage between a Christian and an infidel. It must be conceded that all this goes to the very heart of this case; and these arguments have received the most anxious consideration of the Court.

In deciding this point, I think I may take it for granted, and it will be admitted at once, that the difference of religion or of race, the fact of one party being a Christian and the other pagan, cannot materially, if at all, affect the question. These parties were under the circumstances *sui juris*, and they could, even according to the Defendant's view of the case, have been legally married by proper authority. I am not aware of any English law which prevents a British subject from marrying an infidel, or which would render his marriage with a pagan illegal. If this be a marriage at all, it is quite true that it was a marriage without the intervention of any civil authority, and without any religious or ecclesiastical sanction. The Court has to deal with it as a matter of consent, an agreement to be husband and wife, followed by *concubitus* and long cohabitation, and general repute. I think I cannot do better than cite the words of the great Lord Stowell, giving judgment in the Dalrymple case.—(2 Haggard's Consistory Reports, vol. 2, page 62.)—He says:

"Marriage, being a contract, is of course *consensual* (as is "much insisted on, I observe, by some of the learned advocates) "for it is of the essence of all contracts, to be constituted by the

"consent of parties. *Consensus non concubitus facit matrimo-*
" *nium*, the maxim of the Roman civil law, is, in truth, the maxim
" of all law upon the subject; for the *concubitus* may take place,
" for the mere gratification of present appetite, without a view to
" any thing further; but a marriage must be something more; it
" must be an agreement of the parties looking to the *consortium*
" *vitæ*: an agreement indeed of parties capable of the *concubitus*,
" for though the *concubitus* itself will not constitute marriage,
" yet it is so far one of the essential duties, for which the parties
" stipulate, that the incapacity of either party to satisfy that
" duty nullifies the contract. Marriage, in its origin, is a
" contract of natural law; it may exist between two individuals
" of different sexes, although no third person existed in the
" world, as happened in the case of the common ancestors of
" mankind: It is the parent, not the child, of civil society,
" '*Principium urbis et quasi seminarium Reipublicæ.*' In civil
" society it becomes a civil contract, regulated and prescribed
" by law, and endowed with civil consequences. In most civilized
" countries, acting under a sense of the force of sacred obliga-
" tions, it has all the sanctions of religion super-added: It then
" becomes a religious, as well as a natural, and civil contract;
" for it is a great mistake to suppose that, because it is the one,
" therefore it may not likewise be the other. Heaven itself is
" made a party to the contract, and the consent of the indivi-
" duals pledged to each other, is ratified and consecrated by a
" vow to God. It was natural enough that such a contract
" should, under the religious system which prevailed in *Europe*,
" fall under ecclesiastical notice and cognizance, with respect
" both to its theological and its legal constitution; though it
" is not unworthy of remark that, amidst the manifold ritual
" provisions, made by the Divine Lawgiver of the Jews, for
" various offices and transactions of life, there is no ceremony
" prescribed for the celebration of marriage. In the Christian
" church, marriage was elevated in a later age to the dignity of
" a sacrament, in consequence of its divine institution, and of
" some expressions of high and mysterious import respecting it
" contained in the sacred writings. The law of the Church, the
" canon law (a system which, in spite of its absurd pretensions
" to a higher origin, is in many of its provisions deeply enough
" founded in the wisdom of man,) although, in conformity to the
" prevailing theological opinion, it reverenced marriage as a
" sacrament, still so far respected its natural and civil origin, as
" to consider, that where the natural and civil contract was
" formed, it had the full essence of matrimony without the

" intervention of the priest; it had even in that state the " character of a sacrament: for it is a misapprehension to " suppose, that this intervention was required as matter of " necessity, even for that purpose, before the Council of *Trent*. " It appears from the histories of that council, as well as from " many other authorities, that this was the state of the earlier " law, till that council passed its decree for the formation of " marriage: The consent of two parties expressed in words of " present mutual acceptance, constituted an actual and legal " marriage."

In the preceding remarks Lord Stowell is describing a marriage extremely similar to the one proved in this case, less the twenty-eight years' cohabitation. After all, what is there so immoral or revolting in this Indian usage? Jacob espoused the daughters of Laban, two sisters, very much in the same way; he bought them, he worked for them; and several instances of similar marriages are recorded in Holy Writ. The Egyptians too, as far as we can ascertain anything about their marriage rites, and the Greeks, bought their wives and made presents on obtaining the consent of the parents and that of their daughter. According to the custom of the first ages of the Republic, the Roman husband bought his bride of her parents; they partook of a salt cake of *far* or rice, and after this *confarreation* both parties were seated on the same sheepskin, and the ceremony was completed. After the success of the Punic wars, and in later times, amid the increasing opulence and the growing corruption of society and manners, Roman marriages, owing to the intrigues and ambition of the women, became conspicuous for pomp and ceremony; but even then consent and *concubitus* were the main, the essential ingredients of the contract. This primitive state of things is pretty much what we find among the barbarians of North America, and very nearly, if not exactly, what is proved in the present case; nor can I perceive that much, or any more, was required in earlier times, either by the canon law or by the common law of England, France, or Scotland. For all these reasons, I am clearly of opinion that this case comes under the operation of the general rule of the *lex loci contractus* above referred to.

I have, as before stated, made diligent and extensive researches into the law on this subject, in order to ascertain whether this exception to the general rule, insisted upon by the Defendant, could be found in any book of competent authority, or in any judicial decision, and I am bound to say I can find none—nor do I believe that any exists. There is, besides,

one answer to all this, and a very plain one. 1st, The supreme authority of the empire, in not abolishing or altering the Indian law, and allowing it to exist for one hundred years, impliedly sanctioned it: and, 2nd, The sovereign power in these matters, by proclamation, has tacitly acknowledged these laws and usages of the Indians to be in force, and so long as they are in force as a law in any part of the British empire or elsewhere, this Court must acknowledge and enforce them.

This Indian custom or usage is, as regards the jurisdiction of this Court, a foreign law of marriage; but it obtains within the territories and possessions of the Crown of England, and until it is altered, I cannot disregard it. It is competent—it has been competent during the last hundred years, for the Parliament of Great Britain to abrogate those Indian laws, and to substitute others for them. It has not thought proper to do so, and I shall not. This pretention is therefore utterly unfounded.

It is urged by the Defendant, as before stated, that there is no legal proof that Connolly was ever married to this Indian woman. Now apart from his own express declarations to the contrary, and his long acknowledgment of her as his wife, we have twenty-eight years of cohabitation and repute, and I come now to consider what effect in law this fact has upon the case before us, and I find, first, the following decisions of our Courts:

SUPERIOR COURT, MONTREAL,

No. 283.

TRANCHEMONTAGNE *vs* MONTFERRAND & UX.,

AND

CHARLES FARIS, Opposant.

(Present: Judges Smith, Vanfelson, and Mondelet.)

Lands were seized as belonging to Defendant Montferrand's wife, one Louise Faris, daughter of Hugh Faris and Mainville, by an Indian marriage, previous to the year 1810. Hugh Faris was a Canadian, and his wife, Mainville, a half-breed or "Metis" Indian. They were married according to the custom of the country; and in this cause, no proof of any ceremony was made, but simply cohabitation and reputation. Charles Faris, nephew of Hugh, opposed the seizure and sale, claiming the property as the rightful heir of Hugh Faris.

Plaintiffs contested the opposition on the ground that the female defendant was daughter of Hugh Faris and Josephte Mainville, and legitimate, and that the marriage was valid

So held by Court—Contestation maintained, and opposition dismissed, 27th October, 1854.

AT MONTREAL.—(IN APPEAL.)

[No. 14.]

COURT OF QUEEN'S BENCH, (*March*, 1867.)

MORGAN & AL., Appellants,

AND

GAUVREAU, Respondent.

Present: Hon. Judges Aylwin, Drummond, Badgley, and Mondelet.

No attention paid to certificates filed. Held that declarations of party, verbal and written (in a lease) of marriage, will be binding, and give to Court the right to presume a marriage and to condemn Respondent as the husband.

AT MONTREAL.—(IN APPEAL.)

[No. 10.]

COURT OF QUEEN'S BENCH. [1862.]

HANNAH FISHER, (Plaintiff,) Appellant,

AND

ANGELIQUE GAREAU, (Defd't,) Respondent.

Present: Hon. Judges Duval (Chief-Justice), Meredith, Badgley, and Mondelet.

Demand by Appellant as widow of Samuel Liscom, of Argenteuil, and to him married 16th January, 1864, without contract. A daughter born and Respondent appointed the tutrix to one Samuel Bower or Liscom, legatee universal of Samuel Liscom under his will—demand is for share in community—Plea: an anterior marriage by Samuel Liscom to Pursis Burr—Proof of Defendant.

1. That Church Registers were kept at Greenwich, Mass., U. S.

2. That no entry of marriage could be there found.

3. Cohabitation and Reputation of Liscom and Pursis Burr as man and wife.

Held sufficient evidence.

Action dismissed by Superior Court (Smith, J.), 28th June, 1862.

Judgment unanimously confirmed in appeal 9th March, 1864.

Mr. Stephens, the Plaintiff's Counsel, has also submitted the following authorities :—

" Where marriage proved to have been solemnised abroad, " but doubtful whether strictly according to rites of Church of " England, and not according to custom of country where it took " place, held sufficient with evidence of cohabitation."—Catherwood *vs.* Caslon, 1. C. & M. 431 ; Woodgate *vs.* Potts, 2. C. & P. 467.

" Reputation is good evidence of marriage, though the party " adducing it, seeks to recover as heir at law, and his parents are " still living."—Fleming *vs.* Fleming, 4 Bing. 466.

" Cohabitation as man and wife furnishes presumptive evidence " of a preceding marriage."—Holmes vs. Holmes, 6 L. R. 470; Evans vs. Magoon; Exchequer Reports, 2 Crompton & Jarris 453, Danty, Preuve, pages 100–112, &c., &c., &c.

" Ainsi deux personnes qui ont toujours vécu publiquement " comme mari et femme, et qui ont passé pour tels, sans contra- " diction, ont la possession d'état de mari et de femme."—Toullier, Vol. 1, No. 597.

" C'est donc le nom et la dignité du mariage, la cohabitation " possible et présumée, la présomption toujours favorable à l'in- " nocence et à l'état des enfants qui forme le premier principe " adopté par les lois en matière de filiation comme l'un des " fondements de la société civile. L'enfant conçu pendant le " mariage a pour père le mari.—Toullier, Vol. 2, No. 790.

" Les faits principaux sont, que l'individu a toujours porté le " nom de son père, que le père l'a traité comme son enfant, et a " pourvu en cette qualité à son éducation, à son entretien, à son " établissement."—Toullier, Vol. 1, No. 869; see Letter of William Connolly to John Reeves, fyled and proved, dated Lac la Pluie, August 7th, 1818, from which I make the following extract :

" The account you give of John is highly satisfactory. I am " quite proud of the little fellow, and sincerely pray God that he " may not defeat the hopes I entertain of him, what obligations " do I not owe you, my dear Reeves, and your worthy aunt, for " your care and attention of my child, &c., &c., &c."

" La force de la possession est telle qu'elle peut tenir lieu de l'acte de naissance."—Toullier, vol. 2, Nos. 871–2.

" Le Code a tranché le doute en décidant qu'à défaut de titre " et de possession constante, ou si l'enfant a été inscrit soit sous " de faux noms, soit comme né de père et mère inconnus, la " preuve de filiation peut se faire par témoins."—Toullier, vol. 2, No. 888.

"When there is absence of *Registres de Mariage*, the civil "status of a person can be proved by the declarations of parents "and by witnesses."—Motz vs. Moreau, 5 Lower Canada Reports, page 433.

"Il est nécessaire de suppléer aux régistres de l'état civil, "lorsqu'il n'en existe point, soit parcequ'il n'en a pas été tenu, "soit parcequ'ils sont perdus." — Toullier, Personnes, vol. 1, No. 345 ; Danty, Preuve, pages 100, 103 et 112.

"Quant aux enfants nés de mariages putatifs, ils sont légitimes "à tous égards."—Toullier, vol. 1, No. 666.

"Where it is necessary to prove the fact of a marriage, the "entry in the Parish Register is not the only evidence : but it "may be proved by persons who were present and witnessed the "ceremony, or by general reputation."—Saunders, *Vbo.*, Secondary Evidence, page 835.

Baron Parke said: "I think there is a great deal of evidence to go to the jury. There is evidence of four years cohabitation "of these persons as husband and wife, and such cohabitation is "evidence of marriage."—Bishop, on Marriage and Divorce, p. 227. 2 Carrington & Payne, p. 460 ; Woodgate *vs.* Potts.

"But when two persons agree to have that commerce for the "procreation and bringing up of children, and for such lasting "cohabitation, that in a state of nature would be a marriage, "and in the absence of all civil and religious institutions, might "safely be presumed to be, as it is popularly called, a marriage "in the sight of God."

LINDO *vs.* BELISARIO.—1 Hagg. Cons. Rep. 216.

"But wherever the matter is not governed by any doctrine "there to be mentioned, no particular form for expressing the "consent is necessary. Nothing more is needed than that in "language which is mutually understood, or in any mode declara-"tory of intention the parties accept of each other as husband "and wife."—Bishop. Vol. 1, No. 229 ; Hicks *vs.* Cochran.—4 Edw., Ch. 107.

"Oral evidence of marriage is admissible when there are no "registers."—Toullier, Vol. 1, Nos. 345, 884; do. 2, No. 888 ; Code Civil Canada, No. 232; Danty, Preuve, p. 103, Ed. of 1727.

"As to testimony being allowed where the *acte de baptême* is "false."—Lahaye, Code Annoté, Art 323, and the authorities cited there, page 94 and page 95 (left column.)

"Good faith of one conjoint legitimises children."—Favard de Langlade ; Rep. de la Nou. Légls. ; Verbo Marriage, p. 487, Ed. 1823 ; Toullier Vol. 1, Nos. 653, 660, 661, 662 and 663.

The Court will now refer to some authorities touching proof of the legitimacy of Plaintiff.—See Code Civil, Canada, Art. 232.

" When the child is inscribed under false names or as *inconnu*, " la preuve de filiation peut se faire par témoins."—Toullier, Vol. 2, No. 888.

" S'il existe des enfants issus de deux individus qui ont vécu " publiquement comme mari et femme, et qui *sont tous deux* " *décédés*, la légitimité des enfants ne peut être contestée sous " prétexte du défaut de représentation de l'acte de célébration " de mariage, lorsque cette légitimité est prouvée par une pos- " session d'état."—Toullier, Vol. 1, No. 238.

" La possession d'état a trois caractères : *nomen*, *tractatus*, *et* " *fama*."—Toullier, Vol. 2, No. 869.

" La force de la possession est qu'elle peut tenir lieu de l'acte " de naissance."—Toullier, Vol. 2, Nos. 869, 871, 872.

" When it is proved that the child is born of a female who was " married at the time of its birth, the law takes him under its " protection, and says : *Pater est quem nuptiæ demonstrant*."—Rutledge and Carruthers, Fac Coll. 19th May 1812, Burge, Vol. 1, Page 59.

Much has been said about the Law of England prevailing at Rat River, but the Court is clearly of opinion that Mr. Connolly could not take with him to Rat River in his knapsack, the Common Law of England, nor could he bring back with him, to civilization, in a bark canoe, the Indian custom or usage of repudiation.

It has been said in this case that the Plaintiff's *status* was that of illegitimacy, and these authorities do not apply ; if this be true, he was considered so only after Connolly repudiated his mother and married another woman. In the North-West and at St. Eustache he was regarded as legitimate.

The Defendant has pleaded and argued that the Plaintiff and his mother Susanne continuously acquiesced in this marriage of Wm. Connolly with Miss Woolrich. Letters have been produced. Some of these letters are addressed to the late Mr. Connolly, and several to Miss Woolrich, and are from the children and grand-children of Susanne ; they are replete with expressions of gratitude, and the warmest affection to their father and the Defendant ; and there can be no doubt but this amiable and accomplished lady treated both Susanne and her children, with marks of friendly regard ; the children even with affection ; but, as a matter of fact, so far as regards Susanne and the Plaintiff, John Connolly, there are no letters ; there is nothing whatever to show express or implied acquiescence on the part of either

of them,—nothing to establish express or implied acknowledgment or recognition of Miss Woolrich as the wife of Mr. Connolly, or of the marriage relied upon by the Defendant; inaction, silence, indifference, are not acquiescence; but even if they did constitute such acquiescence, it would amount to nothing in the present case. The marriage of Mr. Connolly with Miss Woolrich was good, or it was bad under the law of the land. If, as a matter of fact, Mr. Connolly was married to the Indian woman, his subsequent marriage to the Defendant was null and void, and no acquiescence or sanction by his first wife could make it good. If Susanne was not his wife, his marriage with Miss Woolrich was valid, irrespective of any acquiescence by Susanne and her children. Lord Stowell thus speaks of that kind of acquiescence in Dalrymple vs. Dalrymple, 2 Hagg., p. 129.

"It is said that, by the law of *Scotland*, if the wife of the first "private marriage chooses to lie by, and to suffer another woman "to be trepanned into a marriage with her husband, she may be "barred *personali exceptione* from asserting her own marriage. "Certainly no such principle ever found its way into the law of "*England;* no connivance would affect the validity of her own "marriage; even an active concurrence on her part, in seducing "an innocent woman into a fraudulent marriage with her own "husband, though it might possibly subject her to punishment "for a criminal conspiracy, would have no such effect. But it "is proper, that I should attend to the rule of the law of Scotland "upon this subject. There is no proof, I think, upon the exhibition "of *Scotch* law, which has been furnished to the Court, that "such a principle was ever admitted authoritatively; for though "in the gross case of *Campbell* versus *Cochrane*, in the year "1747, the Court of Session did hold this doctrine, yet it was "afterwards retracted and abandoned, on the part of the second "wife, before the House of Lords, which, most assuredly, it would "not have been, if any hope had been entertained of upholding "it as the genuine law of *Scotland*, because the second wife "could never have been advised to consent to the admission of "evidence, which very nearly overthrew the rights of her own "marriage. Under the correct application of the principles "of that law, I conceive the doctrine of a *medium impedi-* "*mentum* to be no other than this, that on the *factum* of a "marriage, questioned upon the ground of the want of a "serious purpose, and mutual understanding between the "parties, or indeed on any other ground, it is a most important "circumstance, in opposition to the real existence of such serious

" purpose or understanding, or of the existence of a marriage, " that the wife did not assert her rights, when called upon " to do so, but suffered them to be transferred to another " woman, without any reclamation on her part."

If any authority were required upon this point, this seems to me to be very conclusive; it most decisively disposes of the Defendant's argument about acquiescence in this case. It will be remarked that Lord Stowell is speaking of a private or clandestine marriage, the one then under consideration in the Dalrymple case; but there was nothing secret or clandestine in the marriage of Mr. Connolly with the Cree woman. Their relation as husband and wife were as public as such relations could be. Miss Woolrich was Connolly's cousin. When she was married, this lady was no longer young. She was thirty six years of age. The Indian wife had been living with Mr. Connolly at St. Eustache, and afterwards she and several of the children resided with Connolly's sister, Miss Woolrich's cousin, in Montreal. It is a fair inference, and one which I regard as inevitable, from the evidence adduced, that Miss Woolrich well knew of the existence of the Indian woman, and of her intimate relations with her cousin, Mr. Connolly; that she was aware that there was a numerous family, issue of that connection, I have no doubt. While stating this to be the opinion of the Court, I feel it my duty to express the belief that Miss Woolrich was unaware of the existence of a lawful marriage between her cousin and the Indian woman. I am entirely satisfied of this; and I think it is beyond all doubt that Miss Woolrich was in perfect good faith, when she married Connolly; so also was the Cree maiden, at the age of fifteen, when Connolly took her as his wife: both were in good faith, and, so far, they were very much in the same position. It is in regard to Miss Woolrich's ignorance of this marriage, and her good faith, the Defendant's Counsel urge, that it required very little to show acquiescence; silence, inaction, would be sufficient. Now, so far as the Plaintiff was concerned, he had no notice to give to Miss Woolrich; he had no approval or disapproval to offer. And as to the Indian wife, what had she to say or to do? She did not mislead or deceive Miss Woolrich; that was all Connolly's work. This argument is extremely weak, and cannot be entertained for a moment by the Court. But as some stress has been laid upon this question of acquiescence, I would refer again to this point—the alleged continual acquiescence in this second marriage on the part of the Plaintiff and his mother. It is proved that when Susanne heard that Connolly had deserted her and married another woman, she smiled: what she meant to express or to convey, by that smile,

does not appear. The smile of a woman may express a variety of emotions: it would not, perhaps, be considered a very reliable indication of feeling in an Indian woman, or in any other; but it may fairly be presumed that Mrs. Connolly (Susanne) did not mean to express approval or satisfaction, for she added "that Miss Woolrich would have only her leavings, and that Connolly would "repent the step he had taken." And Larocque says "she "felt all this very much." Except stating on some occasions that she had been married according to the custom of her tribe, the evidence does not show that she ever alluded to the circumstance afterwards. She may have done so, however; but the testimony does not show it. This silence may, in the case of the Indian woman, be considered as resignation, apathy, pride, or despair at ever being able to vindicate her position as the lawful wife of Connolly; but such conduct could not be regarded as acquiescence on her part in Connolly's second marriage, or in her own fate as his discarded concubine. But it was further urged that from 1844 till her death, in 1862, the Indian wife was supported by Connolly till his death in 1849, and afterwards by Mrs. Julia Connolly in a convent at Red River Settlement. That is true; and this fact, and many others proved, reflect great credit upon the second Mrs. Connolly. But the inaction of this old woman—her accepting support from Connolly and his second wife, in her old age, so many years after she had been discarded—cannot for a moment be viewed as an acquiescence, on her part, in the second marriage; and even so, it would not, as before remarked, make the first bad or the second good. It is not a question of *status* which is now under consideration, but whether there was or was not a marriage between Connolly and the Indian woman? All outside that simple enquiry has nothing whatever to do with this branch of the case as presented to me. Neither the good faith of Miss Woolrich, nor the passive conduct or apathy of the Indian, can avail in the defence of this cause. This position, therefore, of the Defendant, must be declared untenable.

Then it was said, and much insisted on, that one of the incidents of this Cree marriage was, that it might be dissolved at pleasure; and I am free to admit that, as between the natives, it seems to be a practice with these barbarians to repudiate their wives without much ceremony, and that practice appears to be sanctioned by their usages.

How far this is to be regarded as a part of their law of marriage, or merely an abuse of it, tolerated among savages, it is difficult for me to determine. It was argued by Mr. Perkins, in

his remarkable reply and summing up of the Plaintiff's pretensions in this case, that, admitting the argument of the Defendant to the fullest extent, and that marriage among the Indians, or even when between a squaw and a Christian, a European, or American, is dissolvable at the will of the husband or of either party—such a concession can have no effect upon this case. If this Cree marriage was dissolvable at pleasure, Mr. Connolly could perhaps have repudiated his Indian wife, had he done so while residing among the Crees, or where such a barbarous usage prevailed. He might have done so then, if he could do so at all—but when he came to Canada, that right ceased. At all events, he could not dissolve the marriage of his own free will, he could not repudiate her in Canada, in virtue and in pursuance of this Indian usage. A man goes to a country where divorce is allowed, and marries; he returns to his own country, where divorce is not allowed. The Courts of the latter country will not enforce the law of divorce existing in his matrimonial domicile. Much less could Mr. Connolly repudiate his wife by merely wishing to do so and then marry again. The Indian woman was his wife here, and would remain so, until the marriage was dissolved by means known to the law. This pretension of the Defendant is, therefore, without foundation.

It was also urged by the defendant (and upon this argument considerable emphasis was laid) that, Miss Woolrich having enjoyed the *status* of the lawful wife of William Connolly during a period of upwards of thirty years, she had a prescriptive right to be regarded as such. Now it will be borne in mind that Connolly had previously cohabited with the Cree woman during twenty-eight years as his lawful wife. He then repudiated her, and married Miss Woolrich, with whom he cohabited from 1832 till his death in 1849, a period of seventeen years. Susanne died in 1862; Miss Woolrich in 1865. Could Connolly, under the circumstances of this case, prescribe against his first marriage? During the lifetime of the Indian woman, could Miss Woolrich obtain, by prescription, what perhaps she never had in point of law and under the circumstances of this case, the legal *status* of the lawful wife of William Connolly? These questions must be at once answered in the negative. Such a prescription, as that contended for by the Defendant, must arise and exist under circumstances wholly different from those proved in this cause. The Court has no hesitation in saying that this argument cannot be successfully maintained.

It is further contended by the Defendant, that the only *status* of Susanne was that of concubine to William Connolly, and that of the Plaintiff was illegitimacy.

With respect to the Cree woman, this is not the fact. Connolly says he married her according to the usages of her tribe or nation. She passed for his lawful wife during twenty-eight years in the North West country, and he introduced her into civilization and among his christian acquaintances and friends in Lower Canada, as his wife. If she had been his concubine only, it is strange, it is indeed not credible, that he should have lived with her for twenty-eight years—had a numerous family—brought her to Lower Canada, presented her as his wife even to the priest, who baptized two of his children, and have taken her to his sisters in Montreal. This is not to be accepted as the relation existing between Connolly and this Indian woman. The circumstances of the case as proved, rebut every such presumption. The evidence shows conclusively that her *status* was that of a lawful wife, and not that of a harlot, till Connolly repudiated her. If there were any presumption to be invoked it is on her behalf. The *status* of the Indian was not that of his concubine. I am not here to give expression to loose social views of relationships such as these. Upon the facts proved in this case, I must presume this connection to have been legal and regular; it was so reputed till 1831; and I am called upon to administer the law, and not to enforce popular views on these subjects. It may be customary for the christian trader to take as his wife one of these children of the forest, acting in perfect good faith and in conformity with the law and usages of her native country, and after years of toil and love, fidelity and devotion, having always treated her as his lawful wife, this trading adventurer, tired of the connection, may repudiate her, insisting that she has only been his concubine and their offspring bastards. This is one way of doing things; but the sooner this is checked the better; and the sooner these men understand that such outrages upon law and religion will not be sanctioned by our Courts, the more probability there is, that such irregular practices will be discontinued.

It has not been contended by the Defendant that the Indian woman could have repudiated her husband, William Connolly, and had such a pretension been advanced, the Court has no hesitation in saying that it would have been untenable, more especially after they had settled in Lower Canada.

Then, as to the *status* of the Plaintiff; there is no doubt that since the repudiation of his mother by his father and his father's second marriage, he has been regarded as illegitimate, and particularly so by the friends of the late William Connolly and those of the Defendant. I think it is quite true that he has been so

regarded generally, and as far as this general opinion could create a *status*, it has been that of illegitimacy; and, no doubt, under circumstances which it is easy to suppose, such a fact would be of importance. The certificate of baptism of the Plaintiff, in this case, does not establish his illegitimacy. It is somewhat peculiar. Dated the 2nd April, 1813, it is in these words:

"Nous, Curé de Québec, ayons baptisé Jean, né dans le Haut "Canada, âgé de huit ans, et dont les parents légitimes nous sont "inconnus.

"Louise Aylwin et Louis Delamarre
"'Godmother.' 'Godfather.'
"William Connolly, } Witnesses."
"Henry Connolly, }

The father, it is strange to say, was one of the witnesses to this ceremony. It is fair to presume that the priest was informed by the father that the boy was legitimate; but the names of the parents were not given; and to make the mystery still more complete, it was falsely stated that he was born in Upper Canada.

The priest did not know where he was born—did not know who his legitimate parents were. But Mr. Connolly did, and both have been disclosed to this court; and this very certificate establishes, so far as a certificate can establish any thing conclusively, that the Plaintiff was not illegitimate. This argument, therefore, and the objection that this action should have been brought to establish the Plaintiff's legitimacy, or, at least, that such a prayer should have been in the conclusions, are, in the opinion of the court, wholly unfounded.

The technical objection taken that all the children, issue of the marriage of Connolly and the Cree woman, should have joined in this action is clearly untenable. They may have perfectly good reasons for not bringing such an action, and besides they may not choose to do so; but it cannot for a moment be seriously contended that the Plaintiff has not the right to recover his share of the community in the possession of the Defendant, if such community exists.

This case might be disposed of upon a well known principle of law and of morality, and it is this, that where a doubt exists as to the legality of a marriage, Courts of justice are bound to decide in favor of the alleged marriage. All law, all morality, require and sanction this view, even of a doubtful case. In this instance, however, no such doubts exist.

Very little remains for the Court to remark in regard to this branch of the case, but to declare that according to the

view which I feel bound to take of the law and the facts, there was a legal marriage existing between the late Mr. Connolly and the Indian woman. The proof of this marriage results from his own repeated and solemn declarations, to the effect that he had married her according to the custom and usages of her nation:—from the fact conclusively proved of twenty eight years of repute—public acknowledgment and co-habitation as husband and wife—from the circumstances that he gave her his name—bestowed that name upon his children, offspring of that marriage—and from his care and education of these children. It is beyond all question, all doubt, all controversy, that in the North West, among the Crees, among the other Indian tribes or nations: among the Europeans at all stations, posts and settlements of the Hudson's Bay, this union, contracted under such circumstances, persisted in for such a long period of years, characterized by inviolable fidelity and devotion on both sides, and made more sacred by the birth and education of a numerous family, would have been regarded as a legal marriage: it was legal there, and can this Court, after he brought his wife and family to Canada, after having recognized her here as such, presented her as such to the Priest who baptized his children, and to the persons he and she associated with, declare the marriage illegal, null and void. Can I pronounce this connection, formed and continued under such circumstances, concubinage, and brand his offspring as bastards, because Mr. Connolly exercised his Indian privilege of repudiating her and marrying another woman, and waited to exercise that right till he came to Canada where happily for society no such privilege exists? I think not. There would be no law, no justice, no sense, no morality in such a judgment. The Court itself could have testified to the high and accomplished character; to the cultivated intellect and feminine virtues of the amiable lady whose name and position figure so conspicuously in this unhappy case. She passed among many as the lawful and honored wife of William Connolly. She was so reputed. She was respected and beloved by those who knew her best: but behind and beyond all this, there have arisen other claims and other interests. The obscure and stigmatized offspring of William Connolly and his Indian wife has come forward, after many years, to vindicate his mother's memory and honor, and his own rights, as their lawful child. The law is with him. I am called upon to administer it, and I am forced to the conclusion, that the marriage with the Cree woman was legal—that I am bound to recognize it as such, and to declare that the second marriage was and is an absolute nullity.

But there is still another question of very great importance to be decided, and that is, whether, admitting the legality of the first marriage, a community of property resulted from that marriage? Were Connolly and his Indian wife *Communs en biens* as claimed by Plaintiffs' Counsel, and as understood by the law of Lower Canada? The answer to this question involves a point of law and one of fact. The Honorable Mr. Justice Aylwin, a witness for the defence, and whose evidence has already been referred to, by his testimony, disposes of this branch of the case as decisively as he did that of his uncle's marriage with the Indian woman. He says: "At the time the Plaintiff came to "Quebec, in 1813, my uncle lived with his sister, Mrs. Delmar, "and at the same time the late Mr. Connolly came, Julia Woolrich "came also from Montreal, where she was living, and spent the "winter with her. At that time it was understood among all the "family, (that is, by my father, my mother, my aunt Delmar, "my uncle, and Mrs. Connolly, then Julia Woolrich,) it was "understood that there would be a marriage whenever my uncle "could return to Canada, and get rid of the country. Again, "my uncle always said that his intercourse with the Indian "woman was to cease when he left the Indian country. He also "said he was obliged to do as the natives did when he lived in "the North West. He said also that they were brutes, and "that he *always intended* to return to Canada, to marry my aunt "and live happily here in a civilized country. Further, this witness, who knew all about his uncle's affairs and intentions, says:—"The late William Connolly was a native of Lower "Canada. I know that he went to the North West country "with the intention of making his fortune there, and returning to "Canada to reside permanently."

According to this evidence, Mr. Connolly and Julia Woolrich were under an engagement of marriage during a period of nineteen years, and all this time, one most interesting to some people, he was living with an Indian woman whom he introduced every where as his wife, and by whom he had a numerous family. But that is not the question here, though worthy of note in many respects. The Court has no hesitation in saying, that the evidence of Mr. Justice Aylwin, in regard to the facts just adverted to, requires no corroboration. His high position, his eminent name and abilities, place his statements with reference to these particulars beyond the reach of cavil or doubt.

The late William Connolly was born at Lachine, in Lower Canada, about the year 1786, he being seventeen years old when he was married. He was by religion a Roman Catholic, and had

passed his first years in Lower Canada. He entered the service of the North-West Company in 1801, and in 1802 was stationed at Rivière aux Rats, in the Athabaska country. He went there to buy furs and skins from the Indians with no more idea of settlement or residence there than such as was necessary to carry on his trade. It can be easily supposed that he did not, for a single moment at any time, entertain the idea of making his permanent abode or residence in that country, or that he ever lost his intention of returning to Canada so soon as he could. But Mr. Justice Aylwin's evidence leaves no doubt upon these points. The absence of all intention to fix his domicile in that country, the *animus manendi* and the *animus revertendi*, are as obvious as such things can be, from the circumstances of Connolly's position: perhaps no evidence could render the presumption more palpable, but, if such be required, Mr. Connolly himself, in conversations with Mr. Justice Aylwin, has placed this matter entirely beyond question.

It is an admitted principle, that the domicile of birth is presumed to continue till the contrary is proved, that domicile is changed only—

"Quando quis re et facto animum manendi declarat" and that "domicilium non procedit, si ille haberet animum revertendi." These are admitted principles; and two things, therefore, must concur to constitute a domicile; first, residence; and secondly, the intention of making it the home of the party. There must be the fact and the *intent;* for, as Pothier has truly observed, a person cannot establish a domicile in a place except it be *animo et facto*. Voet emphatically says: *Illud certum est, neque solo animo atque destinatione patris familias, aut contestatione solâ, sine re et facto, domicilium constituit; neque solâ domus comparatione nec aliquâ regione: neque solâ habitatione, sine proposito illic perpetuo morandi.* So D'Argentré says: *Quamobrem, si figendi ejus animum non habent, sed usus, necessitatis aut negotionis causâ alicubi sint, protinus à negotio discessuri, domicilium nullo temporis spatio constituunt; cum neque animus sine facto, neque factum sine animo ad id sufficiat.*

"Domicile is acquired 'par le concours de la volonté et du "fait,' *animo et facto*—that is, by actual residence in the place "with the intention that the place thus chosen should be his prin- "cipal and permanent residence, the seat of his fortune, his "family, and his pursuits in life. A new domicile cannot be "acquired by intention alone; but having been once acquired, "it may be retained by intention, without actual residence. "Neither can it be acquired by residence alone, however, long, "without that intention."

Pothier-Introd. Générale aux Cout., p. 4.
D'Argentré, Coutume, Art. 449.
Toullier, liv. 1, Tit. III., No. 371.
Civil Code, Art. 103.

And again:

"There must be an intention to reside permanently."

It would be easy to adduce pages of authority which would go to corroborate the doctrine here laid down, but the Court deems it unnecessary to do so. The principle is well known and every where acknowledged, that the intention to remain permanently must be combined with the fact of residence. In some cases this intention may be presumed, but in this instance there is no room for presumption; and if any presumption whatever could be invoked, it would be against the supposition that Connolly had abandoned his domicile of birth, with the intention of forming a new one in the North West territory. But we have positive evidence to show that he never had such intention, but entirely the contrary; he intended to return so soon as he could get rid of the country, and live happily in a civilized country. This, no doubt, was his intention, was always his intention, which he finally carried out; for he lived in Lower Canada eighteen years after his return and marriage to Miss Woolrich, and then died here. He had made his fortune, the object he had in view in going to the North West, and then returned. The *animus revertendi* is clearly and conclusively established in this case. But then it may be said, and has been urged in argument, that a residence of thirty years confers upon a man a domicile, particularly where he has been married and brought up his family, and carried on and transacted also his chief business in the locality. It will be remembered that lapse of time does not alter the case, when there is a constant, a persistent, intention to return, and no intention to remain. Where the *animus manendi* is wanting, and it is beyond all question as a matter of fact that where the matrimonial domicile of the wife is different from her husband, it does not cause him to lose his domicile of birth. No argument, no authority, is required to prove such to be true as propositions of law. But conceding, for the sake of taking a full and complete view of this matter, that Mr. Connolly, without any intention of remaining, but determined always to return to Canada, did acquire a new domicile in the North-West territory, the next duty of the Court will be to determine at what precise point in that vast and wild region Mr. Connolly had his domicile. Was that domicile at Rat River, or Fort Chippewayan, at Great Slave Lake, Lesser Slave Lake, the Rocky

Mountains, Vancouver's Island, or the Mackenzie River ? was it at Rainy Lake, the Lake of the Woods, Fort Cumberland, York Factory, or Norway House ? was it at Isle à la Crosse, Rat River, or Fort William ? He seems to have visited and to have resided with his family at all or nearly all these places, and it is in evidence that he frequently came to Canada, and more particularly, he was present at the baptism of Plaintiff in 1813 and was at Montreal in 1814. Now in regard to these trading posts, it must be borne in mind that they were situated widely apart—in some cases more than a thousand miles distant, over impassible regions of wilderness. He was a fur trader, and in the prosecution of his business, he went to and fro from trading post to trading post, up and down great rivers, over mountains, across prairies and lakes, and through forests where the European had no settled home, where neither the hand of man nor the arts of civilization had subdued the wilderness or reclaimed the barbarian. The success of his trade itself depended upon barbarism upon the cunning and active co-operation of the native savages and the successful entrapping and slaughtering of the beasts of the forests. He was a dweller around the Indian hunting grounds, and a dealer in furs and skins. There were then no houses except within the forts, no villages, no colonies, no plantations, no civilized settlements, no political or municipal limits, circumscriptions, or institutions, in most of these places; there were no Courts of law, and scarcely any law, except the will of the trader, and the native customs and usages of the Indians. And there was a good reason for the absence of these, because, as before stated, the pecuniary success of both the Hudson's Bay and the North West Companies depended upon retaining those vast regions in a state of barbarism, and they had the power to exclude all other traders and settlers, and consequently to prevent the introduction of every element of European civilization.

Can the Court under these circumstances determine where Mr. Connolly's domicile was, in the North West ? It seems to me to be impossible. But I might, I think, go further, and say that under the circumstances to which I have just adverted, and situated as Mr. Connolly was, he could acquire no legal domicile at Rat River; and in any case, I am clearly of opinion that whatever kind of domicile he may have acquired—for example, we may assume that his matrimonial domicile was there—yet, as a matter of fact, he did not lose his original domicile, his domicile of birth; and in support of this view of the law, it may be proper to refer to some additional authorities on this point, cited by Mr. Stephens.

" It ought always to be remembered that the question, whether " the *status* has been constituted by means of a legal marriage, " is perfectly distinct from the consideration of the rights, powers " and capacities which the *status* confers.

" The enquiry whether the *status* has been constituted, is " answered by the law of the country in which the marriage was " contracted.

" If by a marriage, which, according to that law, is valid, the " *status* is constituted, the connections of the parties with the " law of that country ceases, unless that place be the domicile of " the husband; and then its law governs, not because the " marriage was celebrated there, but because it is the country of " the husband's domicile. The parties, if they do not, by an " express agreement on their marriage, stipulate as to their " future rights and capacities, are presumed to submit to them " as they have been defined by some municipal law; and the " law which, it is presumed, they contemplate, is not that of a " country in which they have no intention to reside, and to " which, therefore, their *status* cannot be subject, but that of the " country in which, as it is the place of their domicile, their " rights and capacities are to be exercised.

" Jurists, therefore, concur in selecting the law of the domicile " of the husband and wife, as that which determines the personal " powers and capacities incident to their *status*, and not the law " of the place in which the marriage was celebrated."

Burge, Col. and For. Laws, vol. I., page 245; Pothier, Community, Nos. 5, 14.

" Whatever contrariety of opinion may exist respecting the " effect of a change of domicile on rights of property acquired " under the law of the matrimonial domicile, there is a general " concurrence among jurists in holding that, although the law " which confers those rights, powers, and capacities is strictly a " personal law, yet its influence exists so long only as the parties " remain subject to it by retaining their matrimonial domicile. " When they quit that domicile, and establish another, their " *status* is governed by the law of the latter, and their capacities " and powers are those which that law confers."

Burge, Col. and For. Law, vol. I., page 253.

Merlin Tome 1, sec. 10, pages 532 and 533.

Pothier, Community, No. 89.

Pothier, Coutume D'Orleans Intro., No. 15.

" A, born at Amsterdam, and the Dutch Consul at Smyrna, " married B at Smyrna, and they entered into an ante-nuptial " contract relative to their respective property. The wife after-

" wards died, leaving two children, and without having made any " disposition of her half of the joined property, as she was " entitled by the settlement to have done. Shortly after her " death, one of the children died at Smyrna. It became a " question whether the law of Smyrna or of Amsterdam regu- " lated the title to the wife's share; in other words, whether the " husband had acquired a domicile at Smyrna or retained his " domicile at Amsterdam? It was decided in favor of the " domicile of the birth at Amsterdam. And even were a man to " remain ten or more years in a place, he cannot be said to have " had there his fixed domicile, so long as it was considered as a " temporary residence."

Burge, vol. I., page 49.

" Where the domicile of the husband and that of the wife are " not the same, the law of the husband's domicile is to prevail, " unless he means to establish himself in that of his wife."

Pothier on Community, Nos. 14, 15, and 16; Burge, page 40.

" When the law of the domicile and that of the *situs* are in conflict with each other, if the question is respecting the state and condition of the person, the law of the place where they are situate is to be followed."

Merlin Rep. Status, Autorisation Maritale, sec. 10.

Story on Conflict of Laws, No. 53.

" Le lieu de la naissance de chaque homme est présumé son " domicile d'affection, par une conséquence de cet amour l'habi- " tude et le commerce intime avec nos parens, nos premiers " instituteurs, nos amis, nous inspire pour notre patrie. Mais " cette présumption de droit céde à la preuve contraire. Celui " qui abandonne son domicile d'origine, en acquert un autre par " le fait, c'est-à-dire, par l'habitation réunie à l'intention de fixer " son domicile dans un lieu; car le domicile, disent les lois, est " plus d'intention que de fait."

Analyse raissonnée du droit Français. (*Verbo*, domicile, Doulcet.)

" Il y à présomption légale pour la conservation de la " nationalité originaire ou du domicile d'origine, jusqu'à la " preuve du changement. De là il suit que lorsqu'un individu a " deux domiciles dans divers territoires, on doit de préférence " avoir égard au lieu de sa naissance. Du reste, c'est un " principe non contesté que l'absence momentanée ne suffit pas " pour former preuve du changement de nationalité ou de " domicile."

Felix, Droit International, vol. I., page 56.

" Domicile is acquired by operation of law, as the necessary

"consequence of some act, of this description is the domicile "which a woman acquires on her marriage, because she then "passes to that of her husband."

Burge, vol. I., page 33.

"It is difficult to lay down any rule which does not admit of "some qualification. A resort to, and residence in a foreign "country, for the purpose of carrying on trade there, may, from "the frequency with which the person visits and returns from "thence, exclude the presumption of an intention to establish a "permanent residence there.

"He may have left his wife and children in the place of his "former domicile, or all his arrangements may be made ex-"clusively with reference to, and as connected with, the prosecu-"cution of his commercial pursuit; he may have remitted all his "money to the place of his former domicile.

"These or any other circumstances, from which it might be "inferred, that his residence was only temporary, and that he "contemplated a return to his former domicile, exclude the "inference that he had taken up a new and abandoned his "former domicile."

Burge, vol. I., page 42.

And now let us see what is to be considered the matrimonial domicile?

"Where the domicile of the husband and that of the wife are "not the same, the law of the husband's domicile is to prevail, "unless he means to establish himself in that of his wife."

Story on Conflict of Laws, Nos. 191, 192, 193, 194 and 196.

"Law of actual domicile governs at death."

Id., Nos. 157, 158, 159, 171, 172, 174, 175, 176, 177, and 178.

"A wife is entitled to one-half of the community, though she "never came into the state."

Coles Widow, and Executors, 7 Louisiana Repts., new series, page 42.

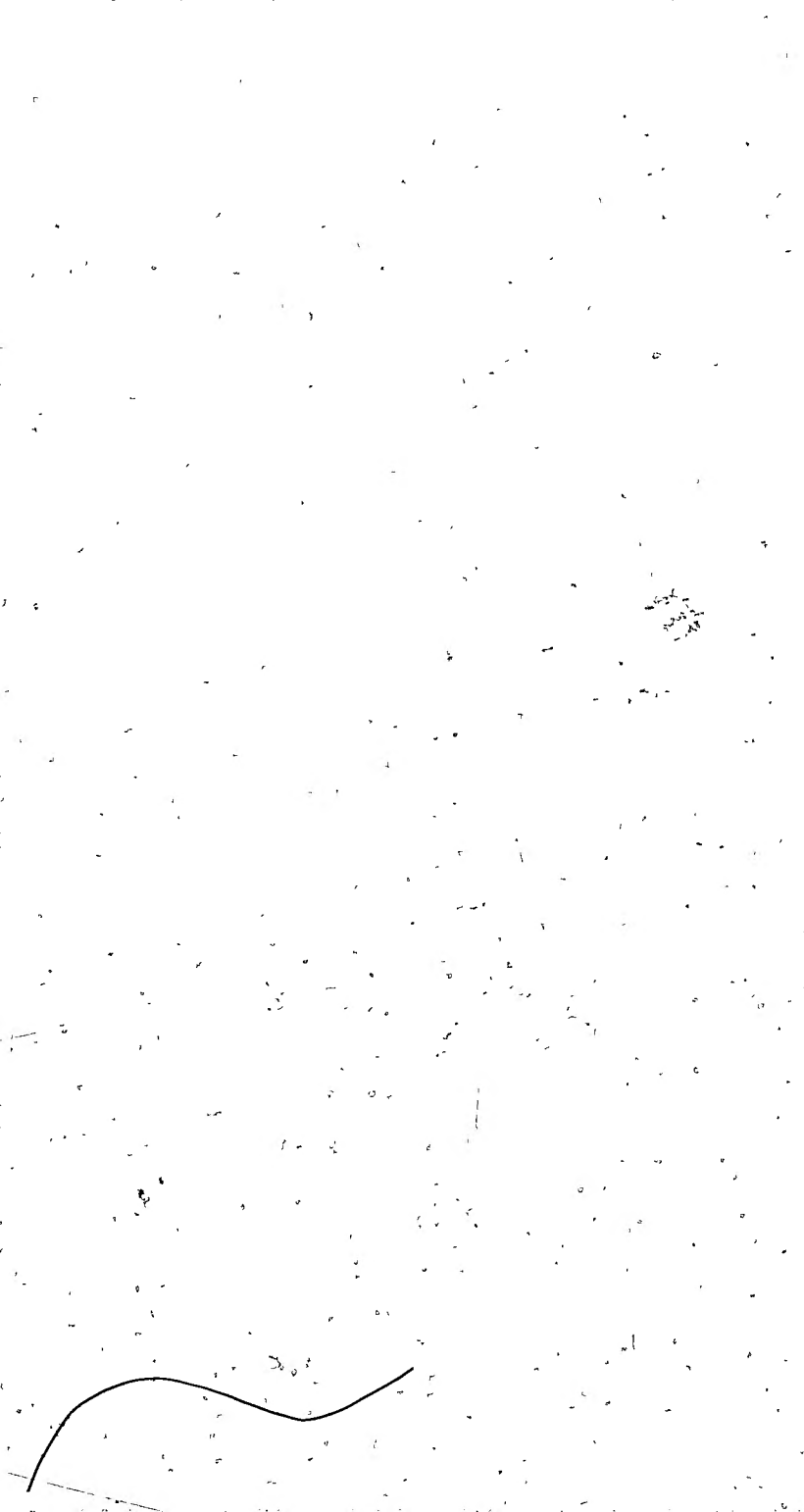
These authorities seem to the Court to have a very direct bearing upon the law of the present case, in regard to the point now under consideration, and there are none on the opposite side, within my reach, which controvert seriously the doctrines here laid down. From what has been said, and under the peculiar circumstances of this case, it is in my opinion beyond doubt as a matter of law, that Connolly, during his absence in the North West Country, though that absence was prolonged through many years, did not lose his domicile of birth, that he never acquired one at *Rivière aux Rats*. I think, moreover, that even his

matrimonial domicile, such as it was, did not change or supersede the one of origin. In that case, whatever may have been the law which prevailed at Rivière aux Rats, a community of property existed between him and his Indian wife from 1803, the date of their marriage. The Court is further of opinion, that, supposing the domicile of birth to have been suspended, if I may so express it, during Connolly's absence in the North West Territory; yet it would revive upon his return to Lower Canada. In that view of the law, he always having had the intention of leaving the Country and returning to Lower Canada, and that intention having been fulfilled by his return, long residence, and death, at Montreal, community existed from the date of his marriage with his Indian wife. Upon both points, therefore, the marriage and the distribution of the property acquired during its existence, according to the pretensions of the Plaintiff, the Court is in his favor.

In conclusion, it becomes the duty of the Court, to thank the Counsel on both sides, for the able assistance given by their argument of this very important case. The judgment must be entered in favor of Plaintiff, and against Defendants.

PERKINS & STEPHENS,
Counsel for Plaintiff.

CROSS (Q. C.) & LUNN,
Counsel for Defendants.



MONTREAL.

PRINTED BY THE MONTREAL PRINTING & PUBLISHING COMPANY.

67 Great St. James Street.

PURCHASED 14 April 1913
FROM Lynch Bros
PLACE OF PURCHASE Cedar Rapids, Iowa
PRICE $3.00 (continued)
LATER CATALOGUED PRICES

MONTREAL SUPERIOR COURT #902, John Connolly, plaintiff: vs Julia Woolrich defendant; and Thos. R Johnson et al executors and defendants, par reprise, d'instance. pp 80, (186-) Montreal. (One page little ink-stained) [illegible 64] $3.00

*A property case; plaintiff was son of an Indian mother by a white man, Wm Conolly. This contains the facts in the case and seems to relate considerably to the Hudson's Bay Co